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No.

Office - Supreme Court, U.S.
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**IN THE
Supreme Court of the United States
OCTOBER TERM, 1982**

LEON W. KNIGHT, et al.,

Appellants,

v.

**MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
et al.,**

Appellees.

**On Appeal from the United States District Court
for the District of Minnesota**

JURISDICTIONAL STATEMENT

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1 December 1982

QUESTIONS PRESENTED

I. Is the Minnesota Public Employment Labor Relations Act (PELRA) repugnant to the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, because it requires an agency of the State of Minnesota to negotiate terms and conditions of employment for Appellants and other of the State's community-college faculty with the Minnesota Community College Faculty Association (MCCFA), a self-interested private organization, thereby:

A. delegating to MCCFA a legislative power to make public policies binding on Appellants; and

B. depriving Appellants and all other non-members of MCCFA throughout Minnesota of legal equality of opportunity to influence the course of public-policy decisionmaking in the community colleges?

II. Is PELRA repugnant to the First Amendment and the Due Process Clause of the Fourteenth Amendment, because it requires Appellants as a condition of public employment to accept MCCFA as their "exclusive representative" for the purpose of negotiating terms and conditions of employment, where the record establishes that:

A. MCCFA and its affiliates, the National Education Association (NEA) and the Minnesota Education Association (MEA), and those affiliates' political-action arms, the Independent Minnesota Political Action Committee for Education (IMPACE) and the National Education Association

Political Action Committee (NEA-PAC), are component-parts of an integrated organization that styles itself the United Teaching Profession (UTP), and operates throughout Minnesota and the United States;

B. its substantial and essential involvement in political activism renders the UTP a political-action organization, indistinguishable from a political party for all relevant purposes of constitutional law; and thereby,

C. PELRA imposes a political-action organization on Appellants as their "sponsor" or "spokesman"?

PARTIES

Appellants are faculty-members in the Minnesota community colleges.¹ Appellee MCCFA is their exclusive representative.² Affiliated with MCCFA in the UTP are Appellees NEA, MEA, and IMPACE,³ to-

¹ Appellants include: Leon W. Knight, Morgan Kjer, Donald A. Dahlin, James D. Wallace, Terrence D. Florin, William B. Bauman, Harold J. Gardner, Thomas J. Patin, Eugene D. Mielke, Dr. Richard A. Thompson, David R. Grout, Joan M. Farkas, Gary Lee Nelson, Ronald Lievense, Lucille Johnson, Virginia E. Lanegran, Max A. Malmquist, Ralph G. Powell, Richard D. Isenhardt, and Creston Gackel.

² Appellees include various past and present officials and staff of MCCFA: James A. Norman, James K. Durham, Robert Ball, Calvin Minke, Ralph S. Chesebrough, and Donald Holman.

³ Appellees include various past and present officials and staff of NEA, MEA, and IMPACE: William M. Mondale, James J. Rosasco, Alfred F. Provo, Albert L. Gallop, Fulton B. Klinkerfues, Janet R. Morgan, John Schutt, James A. Harris, Helen D. Wise, Catherine

gether with non-party NEA-PAC.⁴ Appellee State Officials include past and present members of the Minnesota State Board for Community Colleges (Board);⁵ certain community-college administrators;⁶ and others who have performed or perform various functions under PELRA.⁷

O'C. Barrett, Terry E. Herndon, Sam E. Lambert, Willard H. McGuire, Roger Johnson, and Donald C. Hill.

⁴ Appellees include various past and present officials and staff of NEA-PAC: Fulton B. Klinkerfues, Terry E. Herndon, Willard H. McGuire, and Roger Johnson.

⁵ These Appellees include: Raymond Crippen, Rosemary McVay, John Sontorovich, Hugh V. Plunkett III, Arlene Nycklemoe, Douglas Alan Bruce, Ronald H. Denison, Toyse Kyle, Elma Ponto, Joseph Norquist, Nadine Chase, and Paul Brinkman.

⁶ These Appellees include: Phillip C. Helland, John F. Helling, Dale A. Lorenz, and Neil Christensen.

⁷ These Appellees include: Edward G. Ziegler, Val Bjornson, Charles Swanson, Wayne S. Burggraaff, James Lord, and Peter Obermeyer.

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**On Appeal from the United States District Court
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JURISDICTIONAL STATEMENT

Leon W. Knight, *et alia*, respectfully appeal the findings of fact and judgment of the United States District Court for the District of Minnesota.

OPINIONS BELOW

The unreported findings of fact and opinion of the District Court here for review appear in the separate Appendix (A.) at 31 and 3, respectively. The unreported order of that Court denying Appellants' motions for rehearing appears in A. at 87.

The unreported earlier opinion of the District Court denying Appellants' motion to convene a three-judge

court appears in A. at 67. The opinion of the Court of Appeals for the Eighth Circuit ordering convention of the three-judge court is reported at 535 F.2d 466, and reprinted in A. at 55.

JURISDICTION

On 19 December 1974, Appellants filed their complaint for injunctive relief, invoking jurisdiction under 28 U.S.C. § 1343 and 49 U.S.C. § 1983 (1970), and requesting a three-judge court pursuant to 28 U.S.C. § 2281 (1970). On 13 February 1975, Appellants moved to convene a three-judge court; but the District Court denied this motion on 23 December 1975.⁹ On petition for mandamus, the United States Court of Appeals for the Eighth Circuit ordered convention of the panel on 17 May 1976.¹⁰ On 12 August 1976, Congress repealed 28 U.S.C. § 2281, but provided that the repeal "shall not apply to any action commenced on or before [that date]".¹¹ On 16 November 1981 and 31 March 1982, respectively, the District Court issued its findings of fact and conclusions of law and judgment, denying a permanent injunction with respect to the questions presented by this appeal.¹² The District Court denied Appellants' motions for rehearing on 13 August 1982.¹³ And Appellants filed

⁹ A. at 67.

¹⁰ *Id.* at 55, 535 F.2d 466. The Chief Judge of the Circuit Court designated the panel on 26 May 1976.

¹¹ Pub. L. 94-381, § 7, 90 Stat. 1119, 1120.

¹² A. at 31, 3, 83.

¹³ *Id.* at 87, 95.

their notice of appeal in that Court on 4 October 1982, pursuant to 28 U.S.C. § 2101(b) (1976).¹³

This Court has exclusive appellate jurisdiction under 28 U.S.C. § 1253 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appeal involves the constitutionality, under the First and Fourteenth Amendments to the United States Constitution, of the provisions of PELRA mandating compulsory collective bargaining through exclusive representation.¹⁴

STATEMENT OF THE FACTS

Appellants sued to challenge the constitutionality of compulsory public-sector collective bargaining through exclusive representation. After the Court of Appeals ruled that Appellants raised substantial constitutional questions,¹⁵ the parties entered into extensive stipulations of fact, and presented evidence in hearings on two issues: (i) whether PELRA delegates governmental sovereignty to MCCFA, and thereby abridges popular sovereignty for its benefit; and (ii) whether PELRA requires Appellants to accept a political-action organization as their exclusive representative.

¹³ *Id.* at 99.

¹⁴ The text of these constitutional and statutory provisions appears in *id.* at 105.

¹⁵ For the procedural history, *see ante*, p. 2.

1. The record documents the adverse effects of PELRA on governmental and popular sovereignty.

Appellees conceded that PELRA requires the Board to negotiate with MCCFA, a private organization, over college employment-conditions; that MCCFA is the only organization that can enforce this requirement; that through these imposed negotiations MCCFA attempts as much as possible to influence college employment-policies; and that MCCFA considers itself and the Board "equal partners in [the] process [of setting terms and conditions of employment]".¹⁸

The State Officials' expert-witness in labor and industrial relations, Professor Milton Derber, testified without contradiction that compulsory collective bargaining provides exclusive representatives such as MCCFA with a means to influence governmental policy-decisions not available to other private interest-groups; and that this procedure, added to the representatives' participation in the normal political process of elections and lobbying, gives them a greater ability to influence policy than other citizens have. Derber defined PELRA's requirement that the Board negotiate college employment-policies with MCCFA as "a sharing of responsibility for [that] particular function", and explained this as the result of "an increasing conviction that * * * absolute [governmental] sovereignty * * * was no longer an acceptable idea", and that "State Legislator[s] did have the right and the power to delegate various of these responsibilities

¹⁸ Defendant State Officials' Stipulations, Set I, Nos. 16-20; Transcript of Hearings Before Special Master Leonard K. Lindquist (T.) at 218-19, 466-71, 473-78, 774-78, 5338-46, 5381-82. See Plaintiffs' Revised Stipulations (PRS) Nos. 1667-72; T. at 2140, 2579-85.

or to share them * * * with private groups". Appellants' expert-witness in political economics, Dr. Philip Bradley, testified without contradiction that "[w]hat happens under PELRA * * * is * * * a very substantial shift in the locus of decision making from * * * public authorities * * * to private [collectivities]", and that "these [private] organizational groups * * * possess a tremendous power to make decisions". And Appellants' expert-witness in political theory, Professor Sylvester Petro, testified without contradiction that "[t]here is no way in which governmental sovereignty can survive the existence of an absolute duty to bargain with [a private organization] to which the employees of the government owe allegiance" as their exclusive representative.¹⁷

Appellants' expert-witness in political science, Professor Gordon Tullock, testified without contradiction that statutes enabling private special-interest groups disproportionately to influence governmental officials are inconsistent with the normal pattern of American legislative representation (popular sovereignty).¹⁸

Derber, Bradley, and Appellants' other expert-witness in political economy, Professor Melvyn Krauss, also testified without contradiction that collective bargaining and exclusive representation under PELRA are evolutionally derivative of, functionally equivalent to, and structurally identical with the systems extant under the National Industrial Recovery Act (NIRA)

¹⁷ T. at 5254, 5256, 5265, 5142-43, 5167; 5647, 5650, 5651-52; 1743-53, 1758-59, 1767-73, 1788-90.

¹⁸ *Id.* at 3708-10.

and the Bituminous Coal Conservation Act (BCCA),¹⁹ which this Court held unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*²⁰ and *Carter v. Carter Coal Co.*²¹ Asked whether any laws enacted after NIRA and BCCA “embodied * * * these same principles, these same ideas” and “were of the same nature”, Derber identified “public sector [collective-bargaining] laws” such as PELRA, adding that the concept of bargaining by exclusive representation in PELRA historically evolved—without significant modification—from that concept as first applied in NIRA and BCCA. Derber described PELRA as functionally equivalent to NIRA and BCCA because “each of these three Acts were concerned with * * * providing the framework for the establishment of a system of collective bargaining”. Krauss testified that NIRA, BCCA, and PELRA are structurally identical with respect to the key elements of collective bargaining and exclusive representation. And Bradley confirmed these conclusions.²²

Krauss explained how, through compulsory public-sector bargaining, “the government is in essence coerced to deal with * * * private groups”. “[A]n essential, critical element” of the system is exclusive representation, “the indispensable mechanism by which employees are collectivized”. Exclusive representation

¹⁹ Respectively, Act of 16 June 1933, ch. 90, 48 Stat. 195, and Act of 30 August 1935, ch. 824, 49 Stat. 991.

²⁰ 295 U.S. 495 (1935).

²¹ 298 U.S. 238 (1936).

²² T. at 5177, 5181-82, 5199, 5291; 1324-28, 1341-42, 1352-54; 5626, 5630-31.

“impose[s] conformity of opinion among the members of the collectivized [private] grou[p] with respect to the economic variables with which the group is concerned”, in order “to create a monopoly of political influence”. “[T]he essence of [compulsory public-sector bargaining] is monopoly of political influence. To have monopoly of political influence you need unanimity of action. To have unanimity of action you need conformity of opinion. To have conformity of opinion you need exclusive representation.”²³

Finally, Derber and Bradley re-inforced the connexion among NIRA, BCCA, and PELRA by explaining how PELRA involves a delegation of legislative power to private groups.²⁴

The District Court acknowledged this testimony and Appellants’ contention that, “because MCCFA is a private organization, it holds an impermissible power under PELRA to make ‘economic laws’ and its function constitutes an impermissible delegation of state sovereignty”. But it held that: (1) “Minnesota has not impermissibly delegated its sovereign power”, because “[n]egotiated agreements with state employees and even arbitration awards must be ‘submitted to the legislature to be accepted or rejected’ ”; (2) “the legislature’s retained authority” is sufficient, because “[t]he continuing vitality of *Schechter* and *Carter* * * * is doubtful at best”; (3) this Court’s decision

²³ *Id.* at 1305, 1307-08, 1313-15, 1318-19, 1326-27, 1404, 1406.

²⁴ *Ante*, pp. 4-5. In both *Schechter* and *Carter*, this Court’s decisions turned on the government’s delegations of power to private groups. *Schechter*, 295 U.S. at 537; *Carter*, 298 U.S. at 311.

in *Abood v. Detroit Board of Education*²⁵ “squarely upholds the constitutionality of exclusive representation bargaining in the public sector”; and (4) MCCFA’s ability to exercise extraordinary political influence under PELRA has “no constitutional significance”.²⁶

II. The record establishes that the UTP is an integrated political-action organization.

The UTP itself stipulated that “[t]he United Teaching Profession includes” MCCFA, MEA, and NEA; that NEA considers MCCFA and MEA “integral parts of the United Teaching Profession”; and that both MCCFA and MEA consider themselves “integral parts of the United Teaching Profession”. NEA’s top officials testified that affiliates such as MCCFA and MEA are “integral parts of a larger group”; that they all constitute an “integrated organization that operates cooperatively at [the local, state, and national] levels”; and that “[w]e are in fact three levels combined into one organization”. MEA’s President testified that “the IMPACE operation * * * is an integral part of the MEA organization”; IMPACE’s Chairman admitted that “IMPACE will continue to operate * * * in total unison with the goals and objectives of the parent organization [MEA]”; and IMPACE’s own guidelines recite how its contributions to candidates depend on their voting-records being “consistent with * * * the policies of the united teaching profession”. A top staff-person of NEA testified that NEA-PAC is “a crea-

²⁵ 431 U.S. 209 (1977).

²⁶ A. at 5-7, 9-10 n.8.

ture" of NEA; and NEA-PAC's own guidelines recite its purpose as "support[ing] candidates * * * in order to achieve political decisions consistent with the aims of the United Teaching Profession".²⁷ And the District Court found IMPACE and NEA-PAC to be the "political-action arms" of MEA and NEA, respectively.²⁸

Appellants' expert-witness in organizational science, Professor Craig Schneier, testified without contradiction that NEA, MEA, MCCFA, IMPACE, and NEA-PAC "are very highly integrated to the point of oneness. They act * * * as one organization. * * * [C]ertainly beyond any reasonable doubt * * * the units function as one organization".²⁹

And the few UTP lay-witnesses who speculated on the alleged "separateness" of the units conceded their ignorance of organizational science, how the units actually interact, or both.³⁰

Nonetheless, the District Court found that "MCCFA, MEA, and NEA are not a single integrated organization" and that "IMPACE and NEA-PAC are * * * not part of any single integrated organization".³¹

The District Court assigned to the UTP the burden of proving its political activities "[r]elated to collec-

²⁷ PRS Nos. 405-09; 408a, 435a, 433a; 674, 521, 519; 501, 503.

²⁸ A. at 37.

²⁹ T. at 1168, 1179-83, 1190-91, 1197-1202, 1254. *See id.* at 5460, 5476-77 (unchallenged corroborating testimony of Appellants' other expert-witness in organizational science, Professor Cyril Morgan).

³⁰ *Id.* at 764, 858, 886, 1710-11, 2751, 2760-69, 2788, 4464-67.

³¹ A. at 39.

tive bargaining", in the sense of being "an integral part of the bargaining process".³² Amazingly, however, the UTP itself admitted its substantial and essential involvement in lobbying, propaganda and agitation, political litigation, and political organizing—practically none of which was "an integral part of the bargaining process" in the community colleges.³³ Furthermore, the UTP admitted that substantial involvement in partisan politics—which *Abood* held unrelated to bargaining as a matter of law³⁴—is essential to the achievement of its goals.³⁵

Moreover, Appellants' expert-witness in political science, Professor Tullock, described the record in this

³² *Id.* at 11 & n.12, 32 & n.1. The quoted standard is that of the *Abood* plurality. 431 U.S. at 236 (opinion of Stewart, J.).

³³ PRS Nos. 1453-57, 1459a, 1461-64, 1468-69, 1471-1552a, 1556-58, 1561-80, 1593-1610, 1624, 1626-28; 49-50 (no personnel from NEA and only one staff-man from MEA have bargained on behalf of MCCFA since 1 July 1971). On "substantial" or "essential" involvement in political activism as the defining characteristic of a political-action organization, see Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 322-49 (1978).

³⁴ 431 U.S. at 232-37 (opinion of Stewart, J.), 244 (Stevens, J., concurring), 254 (Powell, J., concurring in the judgment).

³⁵ PRS Nos. 1188-1303. See especially the UTP's slogan "every educational decision is a political decision", emphasizing that it must be involved in partisan-political activism at every level of government, including the election or appointment of city councils, local school boards, state boards of education, state legislatures, state governors, Congress, the President of the United States, and even the Justices of this very Court. Quoted in Plaintiffs' Objections to the Court's Findings of Fact and Motion to Amend the Court's Findings of Fact to Conform to the Law and to the Evidence (MAF) at 104-06, in A. at 270-73.

case as "more complete than I have ever seen before on any pressure group", and characterized the UTP as a dominantly political organization. Tullock explained that the UTP is not a traditional political party, because "it doesn't run [candidates] under its own name", but that, in terms of its degree of political involvement, the distinction "is not very substantial".³⁶

Attempting to relate its political activities to collective bargaining, the UTP introduced exhibits listing budget-allocations of its units. However, Appellants' expert-witness in accounting, Mr. Irving Ross, testified without contradiction that none of the UTP's financial documents had "a specific data base * * * so as to yield information with respect to political expenditures or collective bargaining expenditures", and that none of its other evidence satisfied generally accepted accounting standards and practices respecting the calculation of such expenditures. And the UTP's own lay witnesses confirmed this conclusion in every particular.³⁷

The UTP also interrogated some of its officials and staff concerning their alleged allocation of "working-time". However, this testimony rested on no personal knowledge; lacked supporting documentation; was impugned by the record; or relied on retrospective "estimates" and "guesses", not demonstrable facts.³⁸

³⁶ T. at 3698-702, 3728, 3786.

³⁷ *Id.* at 5560-67, 5584-86, 5605-09; 4429-39, 4472-73, 4491-93, 4504-05, 5086-96, 5107-08, 5369-73, 5376-77, 5384-85.

³⁸ The extensively defective nature of this voluminous material precludes more than a synopsis here. For a detailed critique, see MAF at 131-67, in A. at 299-335.

Furthermore, much of it purported to analyze activities of MEA's "UniServ Directors"—in the face of stipulations that neither NEA nor MEA can determine how much money UniServ units spend on politics and bargaining, or how much time the Directors devote to those activities; and in the teeth of the UTP's own quantitative UniServ survey, showing partisan-political activities in from 87-99% of the units nationwide.³⁹

Nonetheless, the District Court determined that the UTP "is predominantly engaged in activities closely and directly related to collective bargaining", and that therefore Appellants' contention that the UTP is an "integrated organization that functions as a quasi-political party * * * is without merit as a factual matter".⁴⁰

III. Notwithstanding the record, the District Court upheld the constitutionality of PELRA.

Relying on these rulings, the District Court declared that, with regard to exclusive representation, "PELRA as applied to the community colleges is * * * valid in all respects".⁴¹

Appellants objected to the District Court's findings of fact, and moved for rehearing; but the Court denied their motions.⁴² They now seek review of the District Court's findings and judgment.

³⁹ PRS Nos. 69-85, 86-102; 1629, *quoted in* MAF at 70-73 & n.315, *in* A. at 238-40 & n.315.

⁴⁰ A. at 12.

⁴¹ *Id.* at 26.

⁴² *Id.* at 87, 95.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. The District Court's ruling that exclusive representation under PELRA is constitutional expunges the non-delegation doctrine from constitutional law, eviscerates *Schechter* and *Carter*, perverts *Abood*, and, overall, licenses the State of Minnesota to prostitute the political process for the benefit of private special-interest groups.

A. Compulsory public-sector collective bargaining through exclusive representation transfers some measure of decisionmaking authority over public policies from public officials to private groups, thereby delegating governmental sovereignty to those groups. On this point, agreement is unanimous among commentators;⁴³ among the parties to this appeal;⁴⁴ and even among the Judges of the District Court and the Justices of this Court.⁴⁵

⁴³ *E.g.*, C. Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156, 1156, 1157, 1160 (1974) ("[t]he introduction of collective bargaining * * * in the public sector * * * restructures the political process"); R. Summers, *Collective Bargaining and Public Benefit Conferral: A Jurisprudential Critique* (Inst. of Pub. Employment, N.Y. State School of Indus. and Lab. Rel'ns, Monograph No. 7, Nov. 1976), at 3 ("[c]ollective bargaining cannot be engrafted on to [the governmental process] without redistributing power"); Wellington & Winter, "The Limits of Collective Bargaining in Public Employment", 78 *Yale L.J.* 1107, 1109 (1969) ("a great deal of shared control is implicit in any scheme of collective bargaining").

⁴⁴ *See ante*, notes 16-17 & accompanying text. The UTP made no attempt to challenge this expert-testimony.

⁴⁵ Both the District Court, and this Court in *Abood*, commented that bargaining provides employees with "economic benefits" that

1. The District Court, however, held PELRA's delegation of sovereignty to MCCFA "not impermissibl[e]", because "[n]egotiated agreements with state employees and even arbitration awards must be 'submitted to the legislature to be accepted or rejected' ".⁴⁶ Four errors vitiate this conclusion: *First*, it begs the question—which is *not* "What power has the legislature *retained*?", but rather "What power has it *delegated* to private groups?" Even if the Minnesota Legislature itself bargained with MCCFA, it would still have committed the State (through PELRA) to negotiate the content of public policy in the colleges with a private group, subject to compulsory arbitration of disputes and the threat of strikes.⁴⁷ Under PELRA, the Legislature enjoys *less* "retained

justify imposing "agency fees" on non-members of the exclusive representative. A. at 4-5, 8; 431 U.S. at 221-22 (opinion of Stewart, J.). If collective bargaining *creates* benefits for some employees, though, it does so *only by altering the course of public-employment policy from what it would have been absent bargaining*, through the representative's ability to require the government to negotiate the substance of that policy. Now, a State's power to determine the wages, hours, and other working-conditions of its employees is "[o]ne undoubted attribute of state sovereignty". National League of Cities v. Usery, 426 U.S. 833, 845 (1976). Therefore, if *Abood* correctly sustained agency fees as payments for *special* benefits some employees receive from *and solely because of* bargaining, then (to the degree it confers such benefits) bargaining must involve a transfer of "state sovereignty", from the government to private groups. Cf. 431 U.S. at 243 (Rehnquist, J., concurring).

⁴⁶ A. at 5-6.

⁴⁷ See Minn. Stat. §§ 179.63, subd. 16; 179.64; 179.65-179.67; 179.68, subd. 2; 179.69-179.70; 179.74, in A. at 111-27, 129-33, 142-44.

authority" then if it negotiated directly with MCCFA.⁴⁸ Unless the "sharing" of governmental authority with a private group by a state legislature itself is always a "permissible" delegation of sovereign power, PELRA's more egregious arrangement is self-evidently unconstitutional.⁴⁹

Second, the District Court's reliance on "retained authority" myopically focusses on the Legislature's remote, contingent, and limited review, while blinking MCCFA's direct, immediate, and plenary influence over adoption and implementation of college policies. This Court has repeatedly held that a legislature delegates no power by authorizing some party merely to approve, disapprove, suspend, or revive the operation of a statute—because the legislature determines the original substance of the law.⁵⁰ If a *granted* power to

⁴⁸ The Legislature's sole power is to "accep[t] or rejec[t]" but not to modify or impose, "[t]he provisions of the negotiated agreements and arbitration awards". Minn. Stat. § 179.74, subd. 5, in A. at 143. Indeed, the Legislature's own Commission on Employee Relations "may make recommendations [concerning collective bargaining] * * * but no recommendation shall impose any obligation or grant any right or privilege to the parties". Minn. Stat. § 3.855, subd. 2 (emphasis supplied). Moreover, under some circumstances, the Commission may give "interim approval" to a "proposed agreement or arbitration award" that has been "rejected or * * * not approved by the legislature". Minn. Stat. § 179.74, subd. 5, in A. at 143-44.

⁴⁹ See Schechter, 295 U.S. at 537 (congressional "delegation of legislative power [to private groups] is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress").

⁵⁰ *E.g.*, *Curran v. Wallace*, 306 U.S. 1, 15-16 (1939); *Union Bridge Co. v. United States*, 204 U.S. 364, 377-87 (1907); *Field v. Clark*, 143 U.S. 649, 681-83 (1892).

approve or disapprove the operation of a law involves no invalid *delegation*, such a *retained* power hardly constitutes a constitutionally significant *withholding* of legislative authority. Under PELRA, MCCFA and the Board jointly negotiate the agreements the Legislature must accept or reject. These agreements have "all the attributes of legislation for the subjects with which [they] dea[l]".⁵¹ The *real* lawmaking, then, derives from MCCFA's negotiations, not the Legislature's tardy approval thereof.

Third, the District Court's decision forgets that this Court long ago rejected the "retained-authority" defense. Under NIRA and BCCA, executive and administrative officials of the national government could approve, disapprove, modify, or establish themselves the "codes" of economic law the statutes licensed private groups to promulgate.⁵² Nevertheless, *Schechter* and *Carter* condemned the delegations of legislative power to those groups as "utterly inconsistent" with the Constitution and "intolerable".⁵³

Fourth and last, the District Court's ruling obliterates the non-delegation doctrine. For all *delegations*, as opposed to *abdications*, of legislative power implicitly assume the legislature's reservation of authority to revoke its grant, if only by repeal of the statute itself. An explicit statement of this "retained authority" adds nothing. Therefore, if mere "retained authority" immunizes *any* delegation of legislative

⁵¹ Abood, 431 U.S. at 252-53 (Powell, J., concurring in the judgment).

⁵² NIRA §§ 2(a, b), 3(a, d), 4(a), 7(b, c), 48 Stat. at 195-96, 196, 197, 199; BCCA §§ 2(a), 4, Pt. I(a), Pt. II(a, c), Pt. III (c-g), 49 Stat. at 992, 994-95, 995-98, 1001-02.

⁵³ *Schechter*, 295 U.S. at 537; *Carter*, 298 U.S. at 311.

power to private groups, then *all* such delegations—being rationally indistinguishable in this particular—are always constitutional.

For the District Court's decision to stand, then, this Court must join with it in expunging the non-delegation doctrine from constitutional law.

2. Sensing the absurdity of its "retained-authority" thesis in light of *Schechter* and *Carter*, the District Court disparaged their "continuing vitality" as "doubtful at best".⁵⁴ A District Court, however, must enforce this Court's decisions when they apply to the facts before it, not disregard them because of inapposite speculations about their "vitality".⁵⁵ As recent opinions of this Court illustrate, the non-delegation

⁵⁴ A. at 6 & n.5.

⁵⁵ *E.g.*, *United States v. Crocker*, 420 F.2d 307, 209 (8th Cir. 1970); *McCray v. Burrell*, 516 F.2d 357, 364-65 (4th Cir. 1975); *Holmes v. Burr*, 486 F.2d 55, 60 (9th Cir. 1973); *Patterson v. Brown*, 393 F.2d 733, 736 (10th Cir. 1968); *United States v. Miller*, 316 F.2d 81, 83 (6th Cir. 1963).

Besides, the lower-court decisions the District Court cited to rationalize ignoring *Schechter* and *Carter* involved no delegations of legislative authority to private groups at all. *Simon v. Cameron*, 337 F. Supp. 1380, 1383 (C.D. Cal. 1970) (group "with its close state connections should be characterized as a public agency"); *Quincy College and Seminary Corp. v. Burlington Northern, Inc.*, 328 F. Supp. 808, 811 (N.D. Ill. 1971) (authority granted to National Railroad Passenger Corporation [Amtrak] had "sufficient statutory standards and safeguards"; no claim that Amtrak a merely private group). Moreover, the very treatise the District Court cited emphasizes the continuing importance of the non-delegation doctrine where private groups are concerned, and refers to *Carter* as "[o]ne of the most important cases". 1 K. Davis, *Administrative Law Treatise* (2d ed. 1978), § 3:12, at 194.

doctrine of *Schechter* and *Carter* remains the law.⁵⁶ And the uncontradicted testimony of Professors Derber and Krauss, and Dr. Bradley, proves the materiality of that doctrine to the facts of this case.⁵⁷ For the District Court's decision to stand, then, this Court must join with it in eviscerating *Schechter* and

⁵⁶ *Industrial Union Dep't, AFL-CIO v. American Petrol. Inst.*, 448 U.S. 607, 646 (opinion of Stevens, J.), 664 n.1 (Powell, J., concurring in part and in the judgment) (1980); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340-42 (1973); *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring in the result). See also cases in which Justices have asserted the non-delegation doctrine in circumstances where the majority saw no delegation problem. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 125-26 (1978) (Stevens, J., dissenting); *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting); *McGautha v. California*, 402 U.S. 183, 252-54 & nn.2-3, 271-73 & n.21 (1971) (Brennan, J., dissenting); *Zemel v. Rusk*, 381 U.S. 1, 21-22 (1965) (Black, J., dissenting); *Arizona v. California*, 373 U.S. 546, 625-26 (1963) (Harlan, J., dissenting); *United States v. Sharpnack*, 355 U.S. 286, 297-98 (1958) (Douglas, J., dissenting).

Furthermore, two other decisions on which *Carter* relied, *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22 (1928), and *Eubank v. City of Richmond*, 226 U.S. 137, 143 (1912), have also received continuing approbation. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting) (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6-7 (1974); *New Motor Vehicle Bd. of California*, *ante*, 439 U.S. at 125-26 n.30 (Stevens, J., dissenting); *McGautha*, *ante*, 402 U.S. at 254 n.3, 272-73 & n.22 (Brennan, J., dissenting).

⁵⁷ The testimony of both Krauss and Derber rested in large measure on review of this Court's opinions in *Schechter* and *Carter*. T. at 1334-35, 5189-91.

Carter, with all the far-reaching political-economic consequences that action entails.⁵⁸

3. Attempting to avoid *Schechter* and *Carter* altogether, the District Court fantasized that "*Abood* squarely upholds the constitutionality of exclusive representation bargaining in the public sector".⁵⁹ This is a five-fold misrepresentation: *First*, exclusive representation was not at issue in *Abood*. The complaints did not challenge it.⁶⁰ The lower courts did not rule on it.⁶¹ The parties did not contest it before this Court,⁶² but instead agreed that the "appeal * * * does not raise the question".⁶³ And the *Abood* plurality defined the problem as "whether [an agency-shop] arrangement violates * * * constitutional rights", holding that "[a]ll we decide is that * * * the complaint * * * establish[es] a cause of action" with respect to the agency shop.⁶⁴

⁵⁸ See Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", *Gov't Union Rev.*, Vol. 2, No. 1 (Winter 1981), at 56.

⁵⁹ A. at 7.

⁶⁰ Appendix to Brief for Appellants, *Abood v. Detroit Bd. of Educ.*, No. 75-1153 (U.S. Sup. Ct., filed 2 July 1976), at 6-15, 39-52. See 431 U.S. at 213 (opinion of Stewart, J.).

⁶¹ Appendix to Brief for Appellants in *Abood*, at 94-104. See 431 U.S. at 215 (opinion of Stewart, J.).

⁶² Jurisdictional Statement in *Abood* (filed 13 Feb. 1976), at 6; Brief for the Appellants in *Abood* (filed 9 July 1976); at 4; Brief for Appellees in *Abood* (filed 10 Sept. 1976), at x.

⁶³ Brief for the Appellants in *Abood*, at 148. "[T]he states are free to adopt the federal model of * * * exclusive representation (which appellants do not challenge) * * *." Brief for Appellees in *Abood*, at 34 (emphasis supplied).

⁶⁴ 431 U.S. at 211, 236-37 (opinion of Stewart, J.). Accord, *id.* at 217, 224-25 (opinion of Stewart, J.).

Second, no opinion in *Abood* addressed exclusive representation. The plurality invoked the representative's "various responsibilities" as rationalizing the agency shop—without referring to any decision sustaining the delegation of bargaining-privileges to a private organization in the public sector.⁶⁵ Justice Powell noted that a "collective bargaining agreement to which a public agency is a party * * * has all the attributes of legislation", and warned that "voters * * * could complain * * * that their voting power and influence on the [governmental] decision making process had been unconstitutionally diluted" by delegation to a private group of power to participate in making such economic laws—but he, too, refrained from any constitutional judgment.⁶⁶ Justices Rehnquist and Stevens said nothing on the subject. And the parties themselves reserved, or remained silent on, the delegation-question.⁶⁷

Third, the sole constitutional precedent subtending *Abood's* decision on the agency shop, *Railway Em-*

⁶⁵ 431 U.S. at 224-25 (opinion of Stewart, J.). The plurality merely accepted as unchallenged the State's "determin[ation] that labor stability will be served by a system of exclusive representation". *Id.* at 229 (opinion of Stewart, J.). Indeed, except for one decision condemning exclusive representation as "legislative delegation in its most obnoxious form", no opinion of this Court has squarely addressed the matter. Carter, 298 U.S. at 311 (opinion of the Court), 318 (Hughes, C.J., concurring). See *City of Madison, Joint School Dist. No. 8 v. WERC*, 429 U.S. 167, 175 (1976).

⁶⁶ 431 U.S. at 252-53, 262 n.15 (opinion concurring in the judgment).

⁶⁷ Appellants in *Abood* noted the relevance of *Schechter*, *Carter*, and *Lathrop v. Donohue*, 367 U.S. 820 (1961), to the delegation-of-power problem. But they disclaimed any intent to "advert to

ployes' Department v. Hanson,⁶⁸ had nothing to do with exclusive representation. The *Abood* plurality cited *Hanson* only in connexion with the agency shop.⁶⁹ And the Court of Appeals heretofore in this case held *Hanson* irrelevant to exclusive representation.⁷⁰

Fourth, the record in *Abood* lacked "factual concreteness and adversary presentation" even with re-

the controlling nature of these decisions on the issue of exclusive representation", because "[i]t is not our purpose to raise the[se] constitutional conrundrums". Brief for the Appellants in *Abood*, at 126. Appellees' brief contained no reference to *Schechter* or *Carter* at all. Brief for Appellees in *Abood*, at iv-viii.

Not surprisingly, then, the *Abood* plurality also ignored *Schechter* and *Carter*, and acknowledged *Lathrop* only to note that that decision "does not provide a clear holding to guide us in adjudicating the constitutional questions here presented". 431 U.S. at 233 n.29 (opinion of Stewart, J.). Contrast *Lathrop*, 367 U.S. at 853-55 (opinion of Harlan, J.), 878 n.1 (opinion of Douglas, J.) (discussing the relevance of *Schechter*). This silence would depart radically from traditional principles of constitutional adjudication if, as the District Court erroneously implied, *Abood* "overruled" *Schechter* and *Carter* on the delegation-issue.

⁶⁸ 351 U.S. 225 (1956).

⁶⁹ 431 U.S. at 215, 217 n.10, 222 (opinion of Stewart, J.).

⁷⁰ "The petitioners' constitutional challenge to the exclusive representation scheme of the PELRA is distinct from *Hanson*. * * * In contrast [to that challenge], * * * *Hanson* was confronted with an attack on the [Railway Labor Act], which allows for exclusive representation similar to that of the PELRA, but it did not resolve the validity of such a scheme. * * * *Hanson* does not 'foreclose the subject' of petitioners' challenge to the exclusive representation scheme of the PELRA." *Knight v. Alsop*, 535 F.2d 466, 470-71 (8th Cir. 1976), *in A.* at 61-62.

spect to the agency shop.⁷¹ Any "holding" regarding exclusive representation, then, could have amounted only to an advisory opinion, improper under Article III of the Constitution.⁷²

Fifth and last, the *Abood* plurality itself compellingly distinguished the agency-shop issue there from that of exclusive representation here. Assuming the constitutionality of exclusive representation, appellants in *Abood* attacked only the requirement of financial support therefor. Because "[p]ublic employees are not basically different from private employees" with respect to unions, the plurality upheld the agency shop, relying on the private-sector case, *Hanson*.⁷³ Here, Appellants challenge exclusive representation itself, because it delegates public authority to, and abridges popular sovereignty for the benefit of, a private group. Thus, unlike *Abood*, this case hinges on "[t]he very real differences between * * * bargaining in the public and private sectors", particularly that "[t]he uniqueness of public employment * * * is in the special character of the employer", government.⁷⁴

⁷¹ 431 U.S. at 236 (opinion of Stewart, J.). *Accord*, *id.* at 244 & n. (Stevens, J., concurring).

⁷² *See, e.g.*, *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947).

⁷³ 431 U.S. at 230-31, 232 (opinion of Stewart, J.).

⁷⁴ *Id.* at 230 (opinion of Stewart, J.), *quoting* C. Summers, "Public Sector Bargaining: Problems of Governmental Decision-making", 44 *Cinn. L. Rev.* 669, 670 (1975). For this reason, even if relevant, *Abood* would not control here. *See, e.g.*, *Quong Wing v. Kirkendall*, 223 U.S. 59, 63-64 (1912).

In sum, *Abood* is irrelevant because: the record there did not frame the exclusive-representation issue; the parties did not present, argue, or even contest the matter; resolution of the question was unnecessary for the Court's decision; and none of the opinions even described, let alone analyzed or solved, the legal problems Appellants present here.⁷⁵ For the District Court's decision to stand, then, this Court must join with it in perverting *Abood* beyond recognition.

B. By delegating governmental sovereignty to MCCFA, PELRA also abridges popular sovereignty for its benefit. On this point, too, there is unanimity among commentators⁷⁶ and the parties to this ap-

⁷⁵ Compare and contrast *United States v. Mitchell*, 271 U.S. 9, 14 (1926), and *Webster v. Fall*, 266 U.S. 507, 511 (1925) (previous decision not precedent on "question not raised by counsel . . . merely because it existed in the record and might have been raised"). See, e.g., *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Tofft, Weller & Co. v. Munsuri*, 222 U.S. 114, 119-20 (1911); *Cross v. Burke*, 146 U.S. 82, 87 (1892); *Green v. United States*, 355 U.S. 184, 197 n.16 (1957); *Powell v. Alabama*, 287 U.S. 45, 77 (1932); *Snow v. United States*, 118 U.S. 346, 354-55 (1886).

In so far as they imply approbation of exclusive representation, the remarks of the *Abood* plurality cited *ante*, note 65, constitute merely those "general expressions" that "go beyond the case" and "ought not to control the judgment in a subsequent suit, when the very point is presented for decision". *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

⁷⁶ E.g., C. Summer, "Public Sector Bargaining: Problems of Governmental Decisionmaking", 44 *Cinn. L. Rev.* 669, 674-75 (1975) (public-sector bargaining "provide[s] a special process available only to public employees", and "significantly increases the political effectiveness of public employees in determining their

peal." And the members of this Court have not been unmindful of it, either."

The District Court, however, held that the unequal political influence MCCFA enjoys through its unique legal privilege to negotiate college employment-policies has "no constitutional significance".⁷⁶ Exactly the opposite is true: Equally foreign to the Constitution are the notions that government may enhance the

terms and conditions of employment * * * relative to other competing political interest groups"); C. Summers, *ante* note 43, 83 *Yale L.J.* at 1193 (public employees "already have, as citizens, a voice in decisionmaking through customary political channels. The purpose of collective bargaining is to give them * * * a larger voice than the ordinary citizen"); R. Summers, "Public Sector Collective Bargaining Substantially Diminishes Democracy", *Gov't Union Rev.*, Vol. 1, No. 1 (Winter 1980), at 8, 21 ("[t]he redistribution of governmental authority pursuant to statutes establishing collective bargaining inherently diminishes democracy"; "bargaining * * * authenticates * * * a fundamentally nondemocratic mode of decisionmaking—a form of interest group syndicalism"); Lieberman, "Teacher Bargaining: An Autopsy", *The Kappan* (Dec. 1981), at 231, 232 ("[t]hat public sector bargaining is inconsistent with democratic government is no longer in doubt").

⁷⁷ See *ante*, notes 16-18 & accompanying text. The UTP made no attempt to challenge this expert-testimony.

⁷⁸ Abood, 431 U.S. at 229 (opinion of Stewart, J.) ("permitting * * * a union to bargain as [public employees'] exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees * * * in the private sector"), 261 n.15 (Powell, J., concurring in the judgment) (because of delegation of power to exclusive representatives, "voters * * * could complain with force and reason that their voting power and influence on the decisionmaking process ha[ve] been unconstitutionally diluted").

⁷⁹ A. at 9-10 n.8.

speech of one group in order to attenuate the relative voices of others, or distort its decisionmaking processes in order to benefit one group at everyone else's expense.⁸⁰ Indeed, even "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees".⁸¹ Yet PELRA grants MCCFA a monopoly, not simply to express its views, but also to compel the Board to negotiate over those views, and to enter into agreements that have "all the attributes of legislation for the subjects with which [they] dea[l]".⁸²

The essence of compulsory bargaining under PELRA is MCCFA's monopolistic influence over governmental decisionmaking in the colleges. This Court, however, has ruled repeatedly in other contexts that such political discrimination is unconstitutional, even if it promotes or defeats "good" or "bad" political views; balances political power among competing interest-groups; encourages "political stability"; solves "practical [political] problems"; aids or hinders particular economic, social, or other nonpolitical interests; recognizes the "special pecuniary or other interest" of some group in a governmental decision; takes employment-status into account; or even satisfies the demands

⁸⁰ See, e.g., *mutatis mutandis*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-92 (1978); *Washington v. Seattle School Dist. No. 1*, — U.S. —, —, 102 S. Ct. 3187, 3193-95 (1982).

⁸¹ *City of Madison, Joint School Dist. No. 8 v. WERC*, 429 U.S. 167, 175-76 (1976) (footnote omitted).

⁸² *Abood*, 431 U.S. at 252-53 (Powell, J., concurring in the judgment).

of majorities."⁸³ No rational—let alone legal, politically sound, or moral—basis exists for relaxing this precept of democratic government on behalf of a private, self-interested organization such as MCCFA.⁸⁴

For the District Court's decision to stand, then, this Court must join with it in prostituting the political process in a way unknown in American history and violently at odds with the first principles of republicanism.⁸⁵

⁸³ *Cipriano v. City of Houma*, 395 U.S. 701, 704-06 (1969); *Carrington v. Rash*, 380 U.S. 89, 93-94 (1965); *Davis v. Mann*, 377 U.S. 678, 691-92 (1964); *Gray v. Saunders*, 372 U.S. 368, 379-80 (1963); *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968); *Kirkpatrick v. Priesler*, 394 U.S. 526, 533 (1969); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-37, 738 & n.31 (1964); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 208-10 (1970); *Evans v. Cornman*, 398 U.S. 419, 422-26 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 630-33 (1969); *Harper v. Board of Elections*, 383 U.S. 663, 666 (1966).

⁸⁴ *See, e.g., Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 273-74 (1936) (naked attempt to give "economic advantage" to one private group is unconstitutional discrimination). Certainly, where political discrimination is involved, the District Court's "retained-authority" apology is meritless. *See Washington v. Seattle School Dist. No. 1*, — U.S. —, —, 102 S. Ct. 3187, 3198-3200 (1982); *Crawford v. Board of Educ. of City of Los Angeles*, — U.S. —, —, 102 S. Ct. 3211, 3226 (1982) (Marshall, J., dissenting).

⁸⁵ *See The Federalist No. 10, applied to this issue in E. Vieira, Jr., "To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980).

II. The District Court's "finding" that the UTP is not an integrated political-action organization travesties the facts in order to protect the UTP from application of the *Branti* doctrine.

Abood held that, even though public-sector bargaining is "political", a State may require non-members of an exclusive representative to finance such bargaining as a condition of employment. *Branti v. Finkel*,⁸⁶ on the other hand, held that a State may not require its non-policymaking employees to accept a political party as their "sponsor", or to finance any of its activities. Logically reconciled, *Abood* and *Branti* imply that a political party (or equivalently political organization) may not constitutionally serve as an exclusive representative in the public sector."

Appellants contend that MCCFA, MEA, IMPACE, and NEA-PAC are component-parts of an integrated organization, the UTP; that the UTP's substantial and essential involvement in political activism (other than collective bargaining) renders it indistinguishable, for purposes of constitutional law, from a self-styled political party;⁸⁷ and, therefore, that the UTP's local unit, MCCFA, is constitutionally unfit to serve as an exclusive representative under PELRA. The

⁸⁶ 445 U.S. 507 (1980), following *Elrod v. Burns*, 427 U.S. 346 (1976).

⁸⁷ Compare *Abood*, 431 U.S. at 255-57 (Powell, J., concurring in the judgment), 243-44 (Rehnquist, J., concurring), with *Vieira*, ante note 33, 27 *DePaul L. Rev.* at 320-21.

⁸⁸ The UTP has repeatedly characterized itself as a "special-interest group", a "movement", a "faction", or even "the education party". PRS Nos. 1133-34, 1136-38, 1140-43; T. at 456-59, 2107-08, 2565-66, 2635-36, 2639-41, 2991-92.

District Court apparently accepted Appellants' legal analysis, but held that their "theory is without merit as a factual matter" because: (1) the various units are not integrated in the UTP; and (2) "even if MCCFA, MEA and NEA were * * * 'integrated,' * * * each of these organizations is predominantly engaged in activities closely and directly related to collective bargaining".⁸⁹

The merest highlights from the record, however, belie the District Court's ultimate "finding".⁹⁰ And careful review demolishes it utterly: *First*, the "finding" rests on erroneous legal standards.⁹¹ *Second*, it lacks support in clear and convincing evidence, although evidence of that quality is requisite in First-Amendment cases such as this.⁹² *Third*, it gives no weight to the uncontradicted expert-testimony in organizational and political science, although the issues of the UTP's integration and predominantly political character are beyond the ken of laymen.⁹³ *Fourth and last*, line-by-line analysis of all the District Court's subsidiary "findings" on the subject exposes them as false, misrepresentative of the record, irrelevant, or favorable to Appellants (not to the UTP, as that Court pretended).⁹⁴ Indeed, the District Court's ultimate "finding" so transparently burlesques the reali-

⁸⁹ A. at 12.

⁹⁰ *Ante*, pp. 8-12.

⁹¹ See MAF at 88-107, in A. at 255-74.

⁹² See *id.* at 108-67, in A. at 274-335.

⁹³ See *id.* at 36-39, 44-77, 81-88, in A. at 204-07, 213-44, 248-55.

⁹⁴ See *id.* at 167-221, in A. at 335-89.

ties of this case as to suggest it was concocted solely to aid the UTP in escaping the effect of *Branti*.⁹⁵

Even in a case not involving fundamental constitutional liberties, the District Court's "finding" would be reversible as clearly erroneous. Here, where this Court has the responsibility to examine the whole record independently,⁹⁶ the need for and propriety of reversal is even more obvious and imperative.

CONCLUSION

The District Court has ruled that, under the rubric "collective bargaining", Minnesota may delegate legislative power to a self-interested private group, thereby discriminatorily enhancing that group's political influence at the expense of all other citizens in the State. Even worse, the District Court has approved this delegation to a predominantly political organization. Thus, that Court has injected into the corpus of constitutional law the toxic political tenets of the corporative-state—or *fascistic*—system.⁹⁷ That such a result raises substantial questions demanding plenary consideration by this Court is self-evident.

⁹⁵ See *id.* at 20-23, in A. at 179-90. These aberrant actions parallel the District Court's repeated countenancing of the UTP's "cover-ups" during discovery and at trial. See *id.* at 24-27, in A. at 191-94.

⁹⁶ *E.g.*, *NAACP v. Claiborne Hardware Co.*, — U.S. —, — & n.50, 102 S.Ct. 3409, 3427 & n.50 (1982); See MAF at 27-34, in A. at 194-202.

⁹⁷ See MAF at 237-46, in A. at 405-14. See generally, *e.g.*, G. Field, *The Syndical and Corporative Institutions of Italian Fascism* (1938), at 63, 69, 100, 138, 144; F. Pitigliani, *The Italian Corporative State* (1933), at xi-xiii, 11-13, 16-26, 32-33, 40-47, 91-98.

Therefore, this Court should note probable jurisdiction, and set this case down for full briefing and oral argument.

Respectfully submitted,

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1 December 1982

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of the attached **JURISDICTIONAL STATEMENT** on each of the following persons, by depositing said copies with the United States Postal Service, first-class postage prepaid, addressed as follows:

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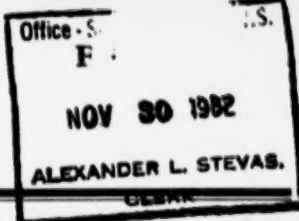
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Done this 1st day of December, 1982.

82-901

No.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

LEON W. KNIGHT, *et al.*,
Appellants,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
et al.,
Appellees.

**On Appeal from the United States District Court
for the District of Minnesota**

APPENDIX TO JURISDICTIONAL STATEMENT

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**MEMORANDUM OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA**

(31 March 1982)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, ET AL, *Plaintiffs,*

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
ET AL, *Defendants.*

MEMORANDUM OPINION AND ORDER

Before HEANEY, Circuit Judge, ALSOP, District Judge, and
LARSON, Senior District Judge.

HEANEY, Circuit Judge.

MEMORANDUM OPINION

Plaintiffs are community college faculty members who challenge the constitutionality of the Minnesota Public Employment Labor Relations Act (PELRA) as applied in the community colleges. Essentially two issues are raised: whether the Minnesota Community College Faculty Association (MCCFA) may act as an exclusive representative under PELRA, and whether the "meet and confer" provisions of PELRA are valid on their face and as applied. Following extensive proceedings and an independent review of the exhaustive record, we entered findings of fact on November 17, 1981, which are attached hereto. This memorandum opinion incorporates our conclusions of law and order for judgment.

I.

MCCFA As An Exclusive Representative

The structure of collective bargaining under PELRA and MCCFA's role thereunder may be summarized as follows.

PELRA provides several mechanisms by which an employee organization may be designated as the exclusive representative of an appropriate bargaining unit. *See* Minn. Stat. § 179.67. The MCCFA is an association of faculty members of the community colleges in Minnesota. It is not disputed that the MCCFA facially qualifies as an employee organization, that community college [2] faculty are an appropriate unit under PELRA,¹ and that the MCCFA was properly certified as an exclusive representative in 1971.

Public employers have an obligation, under PELRA, to "meet and negotiate"² with respect to compensation and other "terms and conditions of employment." *Id.*, § 179.66, subd. 2. When an exclusive representative has been certified, the employer may negotiate only through that representative. *Id.*, § 179.66, subd. 7. The Minnesota State Board for Community Colleges (MSBCC) has negotiated four collective bargaining agreements with the MCCFA since 1971.

Employees are not required by statute to join the MCCFA. Indeed, PELRA expressly provides that employees have "the right not to form [or] join" an employee organization. *Id.*, § 179.65, subd. 2. The contract negotiated

¹ The certification of community college faculty as a single, statewide bargaining unit was upheld in *Minn. State College Bd. v. Public Employment Relations Bd.*, 228 N.W.2d 551 (Minn. 1975).

² The duty to meet and negotiate is defined as:
the performance of the mutual obligations to meet at reasonable times, including where possible meeting in advance of the budget making process, with the good faith intent of entering into an agreement with respect to terms and conditions of employment; provided, that by such obligation neither party is compelled to agree to a proposal or required to make a concession.

by the MCCFA applies to all community college faculty members and its economic benefits flow to all faculty regardless of whether they are members of the MCCFA. PELRA provides that a fair share fee may be collected by an employee organization from nonmember employees that it represents, not to exceed 85% of members' regular dues. *Id.* Such a fee has been collected from plaintiffs by the MCCFA. Determination of the amount of the fee is not in dispute, but we note that PELRA does provide a procedure by which employees may challenge calculation of the fair share fee. *Id.*

The foregoing describes a system of public sector collective bargaining which is common to many states insofar as it applies [3] to traditional subjects of collective bargaining.³ See generally, Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885 (1973). The essential character of such systems is implicated by two claims which the plaintiffs advance here.

A.

Plaintiffs' first contention is that because the MCCFA is a private organization, it holds an impermissible power under PELRA to make "economic laws" and its function constitutes an impermissible delegation of state sovereignty. Under this theory, only a quasi-state agency—some branch of the public employer—may constitutionally serve as the employee representative. We reject this theory.

The State of Minnesota has not impermissibly delegated its sovereign power. The employer's duty to negotiate under PELRA "does not compel the public employer or its representative to agree to a proposal or require the making of a concession." Minn. Stat. § 179.66, subd. 2.

³ The "meet and confer" provisions of PELRA fall outside the traditional scope of collective bargaining and are examined *infra* at p. 9.

Negotiated agreements with state employees and even arbitration awards must be "submitted to the legislature to be accepted or rejected." *Id.*, § 179.74, subd. 5. Contract terms successfully bargained by the MCCFA have been, in fact, subsequently modified by the state legislature. The state might well find it in its own interest to confer more authority upon its employers or to afford public employees more of the rights held by private employees, but we need not speculate on modifications of PELRA that might occur. It is clear that the present structure under PELRA does not impermissibly abridge the state's sovereign power.

In contending that the legislature's retained authority under PELRA is constitutionally inadequate, plaintiffs rely heavily on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Plaintiffs also rely on these cases for the proposition that PELRA confers upon the MCCFA an impermissible power to make [4] "economic laws."⁴ The continuing vitality of *Schechter* and *Carter Coal*, however, is doubtful at best.⁵ Moreover, even if *Schechter* and *Carter Coal* might have some vitality in another context, plaintiffs' reliance

⁴ The plaintiffs called several witnesses and devoted extensive time and resources to develop the theory that PELRA is the functional equivalent of both the legislation struck down in *Schechter* and *Carter Coal*, and of the "corporate-state model of Italian fascism." These theories are without merit in light of the controlling principles of *Abood*.

⁵ See e.g., *Quincy College v. Burlington Northern, Inc.*, 328 F. Supp. 808, 811 (N.D. Ill. 1971) ("The *Schechter* and *Panama* cases have been severely limited to their own facts"); *Simon v. Cameron*, 337 F. Supp. 1380, 1382 n.1 (C.D. Cal. 1970) (*Carter Coal* "has been distinguished and disregarded in recent years to such an extent that it is believed that the Carter non-delegation doctrine is dead"). See also, Davis, *Administrative Treatise*, §§ 3:2, 3:8, 3:12 (1980) ("That the literal opinions in the *Panama* and *Schechter* cases do not embody the effective law is entirely clear").

on them here is clearly foreclosed by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* squarely upholds the constitutionality of exclusive representation bargaining in the public sector.

Abood is central to this case and warrants elaboration. *Abood* involved a public employee bargaining statute similar to Minnesota's PELRA.⁶ The plaintiffs in *Abood* were teachers who had not joined the private employee organization which served as their exclusive representative. Like the plaintiffs here, the teachers objected to compulsory fair share fees on First Amendment grounds. The Supreme Court had previously rejected such claims in the private sector, holding that agency shop arrangements were supported by compelling state interests. See *Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956). In *Abood*, the Court reaffirmed that exclusive representation

avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee [5] of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Id. at 220-221 (citations omitted).

⁶ The Michigan statute at issue in *Abood* provided for designation of an exclusive representative and for collection of fair share fees from employees who were represented by, but not members of, the employee organization. *Abood*, *supra* at 212-215.

Moreover, the *Abood* Court reiterated that the agency shop arrangement has been found to “distribute fairly the cost of [collective bargaining] among those who benefit, and it counteracts the incentive that employees might otherwise have to become ‘free-riders’—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.” *Id.* at 222.

These state policy interests are just as compelling in the public sector. As the Court stated in *Abood*, *supra* at 224, “[t]he desirability of labor peace is no less important in the public sector, nor is the risk of ‘free riders’ any smaller.” Although the agency shop in the public sector necessarily impacts on First Amendment rights, the *Abood* Court found such concerns outweighed by the compelling state interests in orderly labor relations. *Id.* at 222-223, 229-231.

The *Abood* decision is controlling here.⁷ The State of Minnesota has expressly declared that the purpose of PELRA is “to promote orderly and constructive relationships” between public employers and employees and that such a purpose “may best be accomplished” by the bargaining structure provided under PELRA. Minn. Stat. § 179.61. As the *Abood* Court noted, such a determination by the state is to be afforded great weight in the constitutional balance. *Abood*, *supra* at 229. Moreover, such a determination rests on a long tradition in Minnesota of recognizing the importance of the agency shop in resolving traditional subjects of collective bargaining. *See e.g.*, Minn. Stat. § 179.16 (providing for exclusive representation in the private sector since the 1940’s); *see also*, Note, *Certification of a Bargaining Representative under the Minnesota*

⁷ The concurring opinion in *Abood*, *supra* at 254, 259 n.13, makes clear that the majority holding forecloses the specific claim of plaintiffs here. Even if we were not bound by *Abood*, however, we would reject the plaintiffs’ claim for the reasons set forth herein.

Labor Relations Act, 38 Minn. L. Rev. 827 (1954); Note, *History and Provisions of the Minnesota Labor Relations Act*, 24 Minn. L. Rev. 217 (1940). Minnesota may provide for exclusive representation by an employee association [6] in the public sector and may require that nonmembers of the association financially support its collective bargaining efforts through a fair share fee. No constitutional infirmity arises merely because the employee association is a private organization.

B.

Plaintiffs' second contention rests on a factual assertion that the MCCFA, alone and in conjunction with its affiliates, constitutes a quasi-political party or predominantly a political-action organization. The legal claim is that compulsory fair share fees therefore result in forced association with a political party contrary to *Elrod v. Burns*, 427 U.S. 347 (1976), and its progeny. Our resolution of this claim is again guided by the Supreme Court's decision in *Abood*, *supra*.

The teacher-plaintiffs in *Abood* argued that bargaining activity of a public sector union is inherently political and that compulsory financial support of such activity therefore violates First Amendment associational rights. The Supreme Court acknowledged that "decisionmaking by a public employer is above all a political process," *id.* at 228, and noted "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities * * * may be properly termed political." *Id.* at 231. The Court, however, made clear that such "differences between public and private sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. Fol-

* The plaintiffs here argue that allowing a public sector union to be politically active in any respect will confer an unconstitu-

lowing the precedent set in the private sector,⁹ the Court held that public sector unions may collect compulsory fair share fees notwithstanding the "political" character of public bargaining—so long as the fees "are applied to collective bargaining, contract administration, and grievance adjustment purposes." *Id.* [7] at 232. The crucial distinction is union political activity *unrelated* to collective bargaining. The *Abood* Court held that persons opposing such activity may not be compelled to support it through fair share fees. *Id.* at 235-236.

In attempting to show that the MCCFA is predominantly a political action organization, the plaintiffs have persistently ignored the distinction between activities related and those unrelated to collective bargaining. The plaintiffs have instead insisted that activity of the MCCFA which is in any sense "political" must be considered wholly separate from collective bargaining activity.¹⁰ This approach paints with a brush so broad as to obliterate the distinction that the *Abood* Court found to be crucial for constitutional purposes.

We emphasize that the plaintiffs do not advance a narrow claim that some part of their fair share fees are misused for political activity unrelated to collective bargaining. Calculation of the fair share fee is not in dispute here and we note that there is a statutory procedure for resolving

tional political advantage upon public employees. The *Abood* Court acknowledged that public employees might achieve additional influence through political activity. *Id.* at 228. In upholding public sector bargaining and political activity related to such bargaining, the *Abood* Court found no constitutional significance in this "political advantage" theory. Nor do we.

⁹ See *Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956).

¹⁰ See e.g., findings of fact at 12-13.

any such dispute.¹¹ The plaintiffs' claim is that the MCCFA and its affiliates are so overwhelmingly engaged in political activity that they must be deemed to be the equivalent of a political party for constitutional purposes. In light of *Abood*, the factual inquiry turns on whether the activities of MCCFA are related or unrelated to collective bargaining. We have placed the burden on the defendant labor organizations to establish that their activity properly relates to collective bargaining.¹²

[8] Extensive evidence was adduced with respect to the activities of the MCCFA and the other defendant labor organizations, the Minnesota Education Association (MEA), the National Education Association (NEA) and IMPACE (a political action committee affiliated with the MEA). Hundreds of exhibits were introduced by plaintiffs and defendants that relate to the character of activity undertaken by the labor organizations. Numerous staff and officers of the organizations testified as to the extent and character of their political activity. We have independently reviewed the exhaustive record developed before the special master. As our findings indicate,¹³ the record establishes beyond any doubt that the MCCFA, MEA and NEA are properly characterized as public employee organizations

¹¹ See Minn. Stat. § 179.65, subd. 2. In a challenge to the fair share fee, the burden is on the employee association to justify the determination of the fee amount. *Id.*

¹² The plaintiffs in a constitutional challenge ordinarily have the burden of establishing that a constitutional violation exists. In *Abood*, however, the Supreme Court indicated a special concern for the difficulty that individual nonmembers of a union would face in attempting to trace and account for the use of their fair share fees. Accordingly, we have placed the burden on the defendants here to establish whether their activities predominantly relate to collective bargaining.

¹³ See findings of fact at 7-13.

whose political activities relate closely and directly to collective bargaining.

Plaintiffs devoted extensive time and resources to a theory that the MCCFA, MEA, NEA, IMPACE and NEA-PAC (a political action committee affiliated with the NEA) are a single, integrated organization that functions as a quasi-political party. This theory is without merit as a factual matter. IMPACE and NEA-PAC are indeed political action committees, but even members of MEA and NEA do not automatically give support to these committees. These are independent political action committees organized under state and federal law for the purpose of participating in partisan election contests; membership in and support for IMPACE and NEA-PAC is wholly voluntary. MCCFA is affiliated with MEA and NEA and has derived substantial assistance from the latter two organizations during strikes and other collective actions. The MCCFA, however, independently charts its course of collective bargaining on behalf of community college faculty. Finally, even if MCCFA, MEA and NEA were deemed to be in some sense "integrated," the outcome would not change because each of these organizations is predominantly engaged in activities closely and directly related to collective bargaining.

The MCCFA has engaged in legislative activity virtually of necessity because collective bargaining agreements negotiated by the MCCFA must be submitted to the legislature for approval or rejection. *See slip op., supra* at 3. There is simply no basis in this record, however, on which the MCCFA could be deemed anything other than a public employee organization whose purpose [9] is to improve through collective bargaining the terms and conditions of employment for the college faculty it represents.

The plaintiffs' claim therefore fails in two respects. To the extent it rests on the notion that a public sector labor organization cannot engage in political activity that relates

directly to collective bargaining, it is plainly wrong as a matter of law. To the extent it rests on a factual claim that the MCCFA is predominantly engaged in political activity *unrelated* to collective bargaining, it is flatly contradicted by the record. Such activity is not even a significant, much less a predominant, part of the MCCFA's total activity.

II.

Meet and Confer

PELRA distinguishes traditional subjects of collective bargaining from all other issues that arise between employers and employees. The traditional matters—compensation and other “terms and conditions of employment”—are subject to mandatory bargaining in which employers and the exclusive representative of employees must negotiate in good faith to reach an agreement. *See* Minn. Stat. §§ 179.63, subd. 16, subd. 18; 176.65, subd. 4; 179.66, subd. 1, subd. 2, subd. 7. On all matters not subject to this “meet and negotiate” process, professional employees have the express right to “meet and confer” with their employer. *Id.*, § 179.65, subd. 3. Similarly, PELRA imposes a duty upon employers to meet and confer on such matters with professional public employees. *Id.*, § 179.66, subd. 3.

The state interest underlying the meet and confer process is set forth in the statute:

The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters not specified under [the meet and negotiate provisions].

Id., § 179.73, subd. 1.

[10] As a general matter, the meet and confer concept reflects enlightened labor policy and a legitimate state interest in securing the insight of public employees on questions outside the traditional scope of collective bargaining. There is no constitutional infirmity in requiring public employers to solicit and meaningfully consider the views of public employees.

As applied to higher education, the meet and confer process recognizes and codifies a longstanding tradition of a faculty participation in college governance. In light of this tradition of shared decisionmaking, the state has a special interest in securing the views of faculty members on questions of college governance. No college administrator needs this Court to describe the faculty response to unilateral decisionmaking on issues of importance on campus—the literature in the field is more than sufficient. *See e.g.*, Mayhew, L. B., *Surviving the Eighties*, p. 226 (1979) (“It is really the faculty that grants administrators the mandate to govern, and that mandate can be removed by both overt and covert means”); Ladd & Lipset, *The Divided Academy*, pp. 243-299 (1975); D. Walker, *The Effective Administrator* (1979); H. Mason, *College and University Government*, pp. 44-99 (1972) (suggesting that shared authority is “the mode of *rapprochement* between bureaucracy and professionalism in institutions of higher education”).

Nothing in the Constitution would require that the state abandon what appears to be an essential component of college administration—involving the faculty in a broad range of governance decisions. Thus, no infirmity whatsoever attaches to the threshold meet and confer provisions of PELRA—those which require administrators to meet and confer with faculty and which declare the right of the faculty to meet and confer with administrators. *See* Minn. Stat. §§ 179.65, subd. 3; 179.66, subd. 3.

The state also requires that professional employees select a representative for purposes of the meet and confer process. Minn. Stat. § 179.73, subd. 2. This requirement is separate from the selection of an exclusive representative for purposes of mandatory bargaining.¹⁴ Regardless of whether a bargaining [11] representative has been selected, PELRA requires some selection system for purposes of the meet and confer process. As applied to higher education, this effectively compels the establishment of a faculty governance system to function in the meet and confer process.

The meet and confer committees that presently operate¹⁵ are in fact the exclusive formal governance system for resolving issues outside the scope of mandatory bargaining. The collective bargaining agreement provides, for example, that the meet and confer committees "will have full authority in the assigned area to present the views of the employees * * * ." The testimony of college administrators confirms that, although persons may still express their individual views outside the formal process, the "official" view of the faculty is the position adopted by the meet and confer committees. Thus, the weight and significance of individual speech interests have been consciously derogated in favor of systematic, official expression. On any issue that has campus-wide impact, it is difficult to imagine that isolated individual views would have any weight when

¹⁴ Minn. Stat. § 179.73, subd. 2, is a one-sentence requirement that is silent as to the method of selecting meet and confer representatives. In contrast, elaborate procedures are set forth elsewhere for selecting an exclusive representative for purposes of collective bargaining. See Minn. Stat. § 179.67.

¹⁵ The committees are called "exchange of views" committees at the local campus level and "meet and confer" committees at the statewide level. Use of the term "meet and confer" herein refers to both levels of committees.

compared to the "official" view of the faculty. If some faculty members are excluded from participation and deliberation in the meet and confer process, they are effectively denied any meaningful expression on the issues resolved through that process.

The subjects considered by meet and confer committees at the community colleges have included the college budget, curriculum reviews, new course proposals, college organization and campus facilities. Moreover, the scope of the meet and confer process in community colleges sweeps across all issues in college governance that are not subject to mandatory bargaining. These issues in higher education have a special character as a matter of tradition, public policy and constitutional law.

Traditionally, the subjects of meet and confer have been resolved through governance systems in which all faculty members have an opportunity to participate. In the present case, governance at community colleges prior to passage of PELRA consisted of faculty senates and committees, selected through elections in which every faculty member was eligible to both vote and seek election.

[12] Public policy supports the tradition of participation by all faculty members. The free and full exchange of ideas lies at the core of academia's contribution to our society. To protect these values, our society has attempted to insulate institutions of higher education from the orthodoxies of life outside the campus—be they commercial, religious or political orthodoxies that might inhibit the marketplace of ideas.

The right of expression by faculty members also holds a special place under our Constitution, as the Supreme Court has broadly declared. In *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967), the Court stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to

all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment.

In *Shelton v. Tucker*, 364 U.S. 480, 487 (1960), the Court emphasized that "[t]he vigilant protection of constitutional freedoms is no where more vital than in the community of American schools." Similarly, in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), the Court declared:

The essentiality of freedom in the community of American universities is almost self-evident. * * * To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

These cases do not directly control the present matter,¹⁶ but they illustrate that the First Amendment has a special significance in higher education. The vital concern for academic freedom warrants a heightened standard of scrutiny when, as here, the state regulates the forum for academic speech.

We must weigh these constitutional values against the state interest in making the meet and confer process an orderly one. The state has provided that the right to meet and confer may only be exercised through selection of representatives in a governance system. It vigorously contends that requiring some selection process is essential if the meet and confer process [13] is to be effective. We are inclined to agree. Absent such a requirement, administrators in the community college system would be expressly

¹⁶ The issue here is whether faculty members may be excluded from participating in selection of meet and confer representatives and from serving as such representatives, which is a question of first impression.

compelled to meet regularly¹⁷ with each faculty member and group of members that desired to so confer. The result could well be that no meaningful faculty expression would emerge and that both faculty and administrators would be deprived of the benefits from an orderly, systematic exchange of views.

We cannot ignore, however, that the state has created a forum for the exchange of views between faculty and administrators on all issues outside the scope of mandatory bargaining. The meet and confer process may not be a general public forum,¹⁸ but it is an important academic forum. Indeed, it is the only significant forum for the faculty to resolve virtually every issue outside the scope of mandatory bargaining. This structure effectively blocks any meaningful expression by faculty members who are excluded from the formal process. If the state is going to intervene in this manner, we think it must afford all faculty members a fair opportunity both to serve as and to participate in the selection of meet and confer representatives. Thus, Minn. Stat. § 179.73, subd. 2, which requires faculty members to select such representatives, is constitutionally valid so long as every faculty member is afforded a fair opportunity to participate in the selection process.

We emphasize the narrowness of this holding.¹⁹ We are not confronted with a faculty governance system developed

¹⁷ PELRA requires that formal meet and confer sessions be held at least three times a year. *See* Minn. Stat. § 179.73, subd. 2. The spirit and practice, however, have been to meet more often than this, generally on a monthly basis.

¹⁸ If the meet and confer sessions were a public forum, an absolute free speech right would attach in terms of access to that forum. *See City of Madison v. Wisc. Empl. Comm.*, 429 U.S. 167 (1976). *See also*, Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 Minn. L. Rev. 183, 245-249 (1980).

¹⁹ This holding, of course, applies only to higher education.

independent of state compulsion, which would present different considerations. We are not confronted with ad hoc committees or other temporary governance mechanisms which might present special needs for [14] expediency. Nor have we yet addressed what role a faculty union might play in a governance system. We hold only that when the state compels creation of a representative governance system in higher education and utilizes that forum for ongoing debate and resolution of virtually all issues outside the scope of collective bargaining, it must afford every faculty member a fair opportunity to participate in the selection of governance representatives.²⁰

The State of Minnesota has gone one step further in structuring the meet and confer process. PELRA provides that the employer may meet and confer "only through the exclusive representative," if there be one. *See* Minn. Stat. § 179.66, subd. 7. Pursuant to this provision, the collective bargaining contract confers upon the MCCFA the sole authority to select the meet and confer representatives. The MCCFA has held this exclusive power since the passage of PELRA, and has exercised it to exclude nonmembers of the MCCFA from serving on the meet and confer committees.

This practice of systematically excluding nonmembers of the MCCFA obviously deprives such persons of a fair opportunity to participate in the meet and confer process. It also infringes the First Amendment associational rights of faculty members who do not desire to join the MCCFA.

²⁰ Selection of the present meet and confer committee members, for example, might be conducted under MCCFA auspices in fully open elections—such that members and nonmembers of MCCFA could both vote and seek election. We could not find that such a system deprived anyone of a fair opportunity to participate. To precisely define "fair opportunity," however, would require that we speculate on governance structures that are not before us. We decline to do so.

Moreover, the MCCFA's exclusive authority to select the committee representative—regardless of how it is actually exercised—inherently creates a chilling effect on the associational and speech interests of faculty members. The scope of the meet and confer committees reaches many issues that are integral to the professional function of a college professor. If one risks exclusion from these committees by not joining or speaking out against the MCCFA, it seems self-evident that one's freedom not to join or to so speak out is seriously impaired. This risk of exclusion is inherent in the MCCFA's sole authority to select the committee [15] members. The actual practice only bears out that the risk of exclusion is a real one.

Because these effects infringe fundamental First Amendment guarantees, the MCCFA's exclusive selection authority can be upheld only if it is supported by compelling, legitimate state interests which cannot be furthered by less intrusive means. We find no such interests here.

The state does not contend that it has a legitimate interest in excluding nonmembers of the MCCFA from serving on meet and confer committees. Indeed, the state interest expressly underlying the meet and confer process—obtaining the views of employees on matters outside the scope of collective bargaining—argues for hearing the views of all employees not just those that are union members. The state does contend that the meet and confer process must be an orderly, systematic one, but this interest can be fully served without excluding nonmembers of the MCCFA. The process would be no less orderly, for example, if both members and nonmembers of the MCCFA participated in electing committee members.

The core issue is whether the rationale for the agency shop in traditional collective bargaining applies with the same force to the meet and confer process in higher education. We think it does not.

A fundamental element of the agency shop rationale is that, absent collective representation, the employees as a whole could not effectively participate in decisions that are the subject of representation. This, indeed, is a key factor in making union security a legitimate interest of the state. In higher education, however, faculty members have long enjoyed substantial formal and informal participation in college governance—present here in the form of faculty senates prior to PELRA. Such a tradition of shared decisionmaking has not been generally true in other areas of employment or even at other levels of public education. In these other contexts, the state may properly seek to balance labor relations by providing the strongest possible role for a union, but the same state interest is simply not as strong in higher education. If college administrators excluded faculty from matters of governance, there would be a more compelling justification for exclusive union control of faculty governance selection.

[16] Another crucial factor involves the largely economic, tangible nature of traditional collective bargaining. Joining a union cannot constitutionally be made a condition of employment and it is thought that because the tangible benefits of bargaining flow to both members and nonmembers alike, no coercion to join will result in practice. The subjects of meet and confer, however, are generally intangible issues of governance, such as curriculum proposals and academic standards. It simply cannot be said that the benefits of conferring on such issues flow equally to persons who are excluded from conferring. Indeed, the record shows that at least one faculty member joined the MCCFA because he considered participation in the meet and confer process essential to his particular position. Several others also testified that they considered such participation to be an essential part of serving on the faculty. This is precisely the kind of impermissible “joining as a condition of employment” which results from the unique character and tradition of governance in higher education. It does not

result, however, from exclusive representation on matters within the traditional scope of collective bargaining because the tangible fruits of such bargaining flow to all employees regardless of whether they are members of the labor organization.

A third factor involves the union's legitimate need for security, which is generally promoted by excluding rival unions from representing segments of the same bargaining unit and by requiring nonmembers of the union to pay their fair share of the costs of collective bargaining, contract administration and grievance processing. Union security will not be jeopardized by allowing nonmembers of the MCCFA to participate in selection of meet and confer representatives. The MCCFA remains the exclusive representative for all matters subject to the mandatory bargaining provisions. No rival unions could simultaneously represent community college faculty. The MCCFA continues to have sole control over mandatory bargaining, contract administration and grievances. It continues to collect fair share fees from nonmembers to defray the costs of such efforts. No one therefore gets a free ride on the important efforts expended in these areas.

Another factor in the agency shop rationale is that, absent such a system, the employer would be subject to irreconcilable conflicting demands from rival unions. Much of this concern [17] arises because the employer is under a mandatory duty to bargain. Here, however, the mandatory bargaining process remains under the sole control of the MCCFA. In no event would the employer be forced to bargain with more than one group.

The subject matter of meet and confer committees and the scope of mandatory bargaining are mutually exclusive. Of course, it is difficult to draw a line between the two jurisdictions, but this is inevitable unless all issues are subject to just one process or the other. This line drawing has already reached the Minnesota Supreme Court three

times since PELRA was enacted. See *General Drivers Union Local 346 v. Ind. Sch. Dist. No. 704*, 283 N.W.2d 524 (Minn. 1979); *Mpls. Fed. of Teachers v. Mpls. Special Sch. Dist. No. 2*, 258 N.W.2d 802 (Minn. 1977); *Int'l Union of Operating Engineers v. City of Mpls.*, 233 N.W.2d 748 (Minn. 1975). Although there may be an added dimension to the line drawing if the meet and confer committees are open to nonmembers of the MCCFA, the line drawing itself is essentially unchanged. The question remains one that frequently arises in labor law—whether a particular issue is subject to mandatory bargaining.

We thus conclude that the rationale which properly supports the agency shop generally does not justify the MCCFA's sole authority to select meet and confer representatives in the community colleges.

The MCCFA contends that the present practice is not different in any material way from the faculty senate system which preceded PELRA. The argument is that majority selection of a labor organization is the equivalent of majority selection of a faculty senate. Despite its superficial appeal, this contention glosses over constitutional differences between the two systems. The plain fact is that all faculty members formerly had the right to vote for individual representatives that would deal with issues of college and faculty governance. All faculty members could also seek to serve in such roles. These rights are now completely lost unless one joins the MCCFA. The right to even speak out on such issues is further impaired by the knowledge that one could be excluded from serving in the process if the MCCFA should desire to retaliate for protected speech activity. The former faculty senate system did not impair these First Amendment interests, interests which are paramount in the context of higher education.

[18] We hold that the First Amendment interests of faculty members are infringed if the labor organization has sole authority to select meet and confer representatives

and that such infringement, in the context of higher education, is not supported by overriding state interests.²¹ The contract provision establishing such exclusive selection is therefore void and section 179.66, subd. 7, of PELRA is declared unconstitutional insofar as it requires or allows such a practice in the meet and confer context.

In so holding, we do not suggest that a labor organization cannot play a major role in the meet and confer process. To the contrary, the state has an obvious interest in harmonizing the meet and negotiate process with the meet and confer process. Moreover, the MCCFA, as the representative of a majority of the faculty, has a legitimate claim to a significant role in the meet and confer process. If, for example, the present structure were operated under the auspices of the MCCFA, but committee memberships were open to and elected by all faculty, including nonmembers of the MCCFA, legitimate state interests could be served without the constitutional impairments of the present system.

We again emphasize the narrowness of our holding. We are not confronted with a faculty union's role in ad hoc governance mechanisms which might arise from time to time. The need for administrative expedience and potential for impairment of associational rights might well lead to a different result. We will not speculate, however, on the constitutionality of governance mechanisms that are not before us.

III.

Summary

1. The Minnesota Community College Faculty Association (MCCFA) may act as an exclusive representative pursuant to PELRA, Minn. Stat. § 179.61 *et seq.*

²¹ Nothing in our holding should be viewed as if it also applies outside the context of higher education.

[19] (a) The provisions of PELRA that allow for an exclusive representation system of collective bargaining and that impose duties to "meet and negotiate" with respect to compensation and other terms and conditions of employment are constitutionally valid on their face and as applied in the community colleges;

(b) No constitutional violation arises from the MCCFA's status as a private organization. PELRA, on its face and as applied, does not impermissibly delegate sovereign state power nor impermissibly confer any power to make "economic laws;"

(c) No constitutional violation arises from the MCCFA engaging in limited political activity which relates directly to its collective bargaining efforts. MCCFA's function as an exclusive representative under PELRA does not result in any compelled association with a quasi-political party. The MCCFA and the organizations with which it is affiliated (The Minnesota Education Association and National Education Association) do not together constitute a single integrated organization nor are they, alone or in conjunction, a quasi-political party.

2. The present practice of having the MCCFA select all representatives on meet and confer committees is unconstitutional. Such practice has an inherent chilling effect on the associational and speech interests of nonmembers of the MCCFA and, unlike exclusive control over the "meet and negotiate" process, is not supported by compelling state interests.

(a) The meet and confer provisions of PELRA are valid insofar as they impose upon employers the duty to meet and confer and provide employees the right to meet and confer. Nothing in the Constitution requires that the state abandon what appears to be essential in college administration—involving the faculty in college governance;

(b) The provisions requiring employees to select meet and confer representatives, Minn. Stat. § 179.73, subd. 2, as

applied to the community colleges, effectively requires and has resulted in the establishment of a formal governance system which is the primary mechanism for expressing faculty views on all issues outside the mandatory bargaining process. This provision is valid as applied to community colleges only if all faculty members have a fair opportunity both to select and serve as governance representatives.

[20] (c) The clause of the collective bargaining contract which gives the MCCFA sole authority to select meet and confer representatives is void, and the statutory provision which requires the employer to meet and confer only through such organization is invalid insofar as it allows or requires the present practice. *See* Minn. Stat. § 179.66, subd. 7.

(d) The foregoing would not preclude conducting the meet and confer process under the auspices of the MCCFA, so long as both members and nonmembers have a fair opportunity to select and serve on the meet and confer committees.

ORDER FOR JUDGMENT

The constitutional infringements caused by the present meet and confer process in the community colleges clearly occur under color of state law. The Minnesota State Board for Community Colleges, in its official capacity, and the Minnesota Community College Faculty Association must equally share liability inasmuch as they together negotiated the aspects of the present structure which we have found violate plaintiffs' constitutional rights. There is no basis for individual liability or for finding any defendants liable other than the MSBCC and the MCCFA.

The parties have stipulated to nominal money damages of one dollar and we find that no other money damages are appropriate. The plaintiffs are entitled to declaratory and injunctive relief in accordance with this opinion. Therefore, PELRA as applied to the community colleges is declared valid in all respects, except

(1) Minn. Stat. § 179.73, subd. 2, is declared valid so long as all community college faculty members are provided a fair opportunity both to select and serve as meet and confer representatives;

(2) Minn. Stat. § 179.66, subd. 7, is declared unconstitutional only insofar as it allows or requires an exclusive representative in the community colleges to have sole authority to select meet and confer representatives;

(3) The clause of the collective bargaining contract conferring sole selection authority upon the MCCFA is declared invalid, and the MCCFA is enjoined from making any further selections of meet and confer representatives pursuant to such clause.

[21] The defendants shall bear their own costs in this proceeding and 20% of plaintiffs' costs shall be taxed to the MSBCC and the MCCFA, to be borne in equal shares.

Judgment shall be entered in accordance with this order.

/s/ Gerald W. Heaney
GERALD W. HEANEY
United States Circuit Judge

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

LARSON, Senior District Judge, concurring and dissenting.

I am in substantial agreement with the Memorandum Opinion and Order but dissent as to paragraphs (1), (2), and (3) in the Order for Judgment.

/s/ Earl R. Larson
EARL R. LARSON
U. S. Senior District Judge

DATED: March 31, 1982

**FINDINGS OF FACT AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA**

(16 November 1981)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, ET AL, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
ET AL, *Defendants*.

FINDINGS OF FACT AND ORDER

Pursuant to the Order of this Court dated December 13, 1979, the parties have presented extensive evidence before Special Master Leonard E. Lindquist. Proceedings before the Special Master involved 41 hearing days, 6,000 pages of transcript, the introduction of over 500 exhibits and the filing by each party of various briefs and elaborate proposed findings of fact. The Special Master filed his recommended findings of fact with this Court on March 13, 1981.

The following constitutional issues remain for this Court to determine:

(1) Whether it is constitutional, under the First and Fourteenth Amendments, for the Minnesota Community College Faculty Association (MCCFA) to act as "exclusive representative" of plaintiffs pursuant to the collective bargaining provisions of the Minnesota Public Employment Labor Relations Act (PELRA), Minn. Stat. § 179.61 *et seq.*; and

(2) Whether the "meet and confer" provisions of PELRA, Minn. Stat. §§ 179.63, subd. 15, 179.65, subd. 1, and 179.66, subd. 3, 7, are constitutional on their face and as applied to plaintiffs under the First and Fourteenth Amendments.

Before adopting findings of fact, we carefully reviewed the trial record, the stipulations of fact, the parties' proposed findings of fact and the briefs in support thereof. The findings herein represent our independent judgment based upon that review.

[2] In making these findings, we have allocated the burden of proof as follows: plaintiffs must establish that exercise of a specific constitutional right is impaired by the challenged statute or practice and that such a right is deemed a fundamental one. If plaintiffs meet this burden, the defendants must then demonstrate that there is a compelling legitimate state interest served by the challenged statute or practice which outweighs the impairment of the protected right, and that no less restrictive means are reasonably available to pursue such compelling interest.¹ See generally *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976).

Based upon the foregoing, the Report of the Special Master is adopted as modified and set forth herein.

I. Parties

1. Plaintiffs are residents of Minnesota, "public employees" under Minnesota law,² and are employed by the Minnesota State Board for Community Colleges (MSBCC) as follows:

¹ As to plaintiffs' claim that defendant labor organizations are predominantly political in character, we have placed the burden upon the defendants to show that their activities predominantly relate to collective bargaining. See *Abood v. Detroit Board of Education*, 431 U.S. 209, 239 n.40 (1977); cf. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 Minn. L. Rev. 183, 241-249 (1980).

² See Minn. Stat. § 179.63, subd. 7.

a. Leon Knight and Morgan Kjer are faculty members of North Hennepin Community College, located in Brooklyn Park, Minnesota;

b. James D. Wallace, Terrence D. Florin, Harold J. Gardner, Eugene D. Mielke, Joan M. Farkas and Ronald Lievense are faculty members of Normandale Community College, located in Bloomington, Minnesota; and

c. Ralph G. Powell and Cresston Gackle are or were faculty members at Anoka-Ramsey Community College, [3] located in Coon Rapids, Minnesota.³

2. Plaintiffs are represented collectively in the negotiation of collective bargaining agreements, grievance adjustment, and arbitration issues in dispute with MSBCC by defendant Minnesota Community College Faculty Association (MCCFA) which is certified as their exclusive representative pursuant to PELRA. Minn. Stat. § 179.61 *et seq.*

3. Certain of the plaintiffs are not and do not desire to become formal members or supporters, financial or otherwise, of defendants' MCCFA, Minnesota Education Association (MEA), Independent Minnesota Political Action

³ The defendant labor organizations assert, and the plaintiffs have not challenged, that the following plaintiffs are no longer employed as community college faculty members: William B. Bauman, Thomas J. Patin, Dr. Richard A. Thompson, Gary Nelson, Lucille Johnson, Virginia Lanegran and Richard Isenhardt. In addition, three plaintiffs, Donald A. Dahlin, David R. Grout and Max A. Malmquist, had previously expressed a desire to withdraw their participation in the case, which request was denied together with other matters in this Court's Order dated April 24, 1980. The plaintiffs' proposed findings did not include these three persons as identified plaintiffs.

⁴ The following plaintiffs are presently members of the MCCFA: Harold J. Gardner, Eugene D. Mielke, Joan M. Farkas and Cresston Gackle. Ralph G. Powell has become a faculty member at Minneapolis Community College and thereafter joined the MCCFA.

Committee for Education (IMPACE) or National Education Association (NEA), nor do they desire to be represented either individually or collectively by said organizations with respect to terms and conditions of employment, other personnel or educational policies subject to the "meet and confer" provisions of PELRA, or any other matter in which defendant labor organizations are involved.

4. Defendant labor organizations are the MCCFA, MEA, NEA and IMPACE, the structures of which are described *infra* at pp. 4-7.

5. Defendant state officials are as follows:

a. The Minnesota State Board for Community Colleges (MSBCC) is an agency of the State of Minnesota, a "public employer" under PELRA, and is responsible for managing the [4] public community colleges of Minnesota, including those which employ plaintiffs;

b. Phillip C. Helland is the chancellor of the community college system and is the chief executive officer of the MSBCC;

c. Dale A. Lorenz is the president of Normandale Community College, John Helling is the president of North Hennepin Community College;

d. The Minnesota State Treasurer and Commissioner of Finance are involved in the implementation of PELRA for purposes of this action only to the extent that their duties include withholding "fair share fees" from employees' wages and transmitting such fees to the exclusive representative; and

e. The director of the Bureau of Mediation Services' only involvement in this action was his certification of the MCCFA as the exclusive representative of the bargaining unit in 1971 and his subsequent refusal to change that certification in 1974.

II. Structure and Activities of Defendant Labor Organizations

A. Structure

1. *NEA*. NEA is a national voluntary organization of teachers, governed by its Representative Assembly, Board of Directors and Executive Committee, that has both state and local affiliates. Through reciprocal membership requirements as a condition of affiliation, members of a local or state affiliate must become members of the NEA and of both the state and local affiliates.

The principal policymaking body of the NEA is its Representative Assembly, comprised of members of the national, state and local associations. NEA's program budget, constitution, bylaws and standing rules, and resolutions with respect to issues and goals are all voted upon by the Representative Assembly. It also elects the president, vice president, secretary, treasurer, at-large members of the Board [5] of Directors, and the at-large members of the Executive Committee.

Only the NEA may amend its constitution and bylaws, which are separate from those of MEA or MCCFA. The NEA is the exclusive employer of its professional staff and such staff are not subject to supervision by any staff of MEA or MCCFA. No state or local affiliate has any authority over any collective bargaining agreement entered into by the NEA with its professional staff. NEA sets its own budget and no affiliate has authority to interfere with such determinations.

2. *MEA*. The MEA is a statewide voluntary organization of teachers that operates under the direction of its own Representative Assembly, Board of Directors and Executive Committee, all of which are separate from the representative or delegate assemblies, boards and committees of the NEA and MCCFA. The MEA has divided the state into various geographic regions and other units known as UniServ units, each of which serves one or more local asso-

ciations. Every UniServ unit, including the MCCFA, is entitled to representation on the MEA's Board.

MEA has its own constitution and bylaws, which it alone may amend. Such amendment does not require approval by the NEA or any local affiliate.

MEA's staff operate under the direction of MEA's executives and is separate from the staff of NEA and MCCFA, although some MEA staff may be assigned to assist affiliates, including MCCFA.

MEA's boards, committees and assemblies determines its program budget and other expenditure decisions, without any power of review by the NEA or local affiliates.

3. *MCCFA*. The MCCFA is a voluntary organization of community college faculty members operating under the direction of its own Delegate Assembly, Board of Directors and Executive Committee. As an affiliate of the MEA and NEA, MCCFA requires its members to become members of MEA and NEA.

[6] MCCFA's relationship with the NEA and MEA is set forth in the affiliation agreement between these organizations. Under this agreement, MCCFA members pay "unified dues" to the MCCFA, MEA and NEA. The dedication of a portion of such dues to MEA and NEA is in exchange for staff, office and other assistance to MCCFA. Extensive evidence was submitted with respect to accounting for the budgets and allocations between the organizations. The evidence established that at least 75% of MCCFA member dues are expended by or on direct behalf of MCCFA. The portion allocable to the MCCFA is higher if regular indirect MEA and NEA assistance, or emergency aid such as strike assistance, is included.

The authority of MCCFA to maintain the autonomy specified under its constitution, to conduct its own meetings, to elect its own officers and to adopt its own policies, are also provided for in the affiliation agreement.

MCCFA's constitution and bylaws are separate from those of MEA and NEA. MCCFA's bylaws may be amended only by its membership. MCCFA's board of directors, officers and member assemblies are all separate from those of MEA and NEA.

MCCFA alone determines the scope, content, subject matter and direction of its collective bargaining with the MSBCC. NEA and MEA have no authority to determine or participate in the determination of such matters by MCCFA.

4. *IMPACE*. IMPACE is a voluntary, nonprofit committee of individual educators which may be characterized as MEA's political action arm. Its Board of Directors are appointed by the MEA Board of Directors. The IMPACE board exercises general supervision and control of its organization, including all determinations of financial contributions to the campaigns of candidates for public office in Minnesota.

Membership in and contributions to IMPACE are wholly voluntary and distinctly separate from membership in or contributions to MEA, NEA or MCCFA.

IMPACE has sole authority over its funding decisions and other activities. IMPACE contracts and pays for the services of certain MEA staff members together with paying MEA for IMPACE's office space and other support services. [7] IMPACE has no authority to participate in or exercise influence over budget, program, collective bargaining or other regular operations of NEA, MEA or MCCFA.

5. *NEA-PAC*. NEA-PAC is not a defendant. It is a national voluntary, nonprofit committee of teachers which may be characterized as NEA's political action arm. It is governed by its own Steering Committee which determines which campaigns of candidates for federal office shall receive financial contributions. The NEA-PAC Steering Com-

mittee and NEA officers and directors are separate entities. IMPACE Chairman, Roger Johnson, is a member of the NEA-PAC Council by virtue of his IMPACE chairmanship.

Membership in or contribution to NEA-PAC is wholly voluntary and distinctly separate from membership in or contribution to NEA, MEA or MCCFA.

NEA-PAC has no authority to participate in or exercise influence over budget, program, collective bargaining or other regular operations of NEA, MEA or MCCFA.

6. *INTERRELATIONSHIPS*. In limited circumstances, NEA, MEA, MCCFA, NEA-PAC and IMPACE provide to or share with one another various services and facilities. Such sharing of services, facilities or staff is generally financed by each separate organization to the extent such organization directly benefits from the particular sharing arrangement. Officials, staff personnel and representatives of NEA, MEA, MCCFA, NEA-PAC and IMPACE regularly attend meetings with one another, plan certain cooperative programs, report to their respective organizations concerning the activities of the other organizations, and maintain continuous channels of communications among themselves. In special cases, the degree of support for an affiliate may be quite substantial (*see* p. 10, *infra*, regarding strike assistance).

MCCFA, MEA and NEA are related by their agreement of affiliation, by having certain common goals and by occasional sharing arrangements. They are not and do not function or operate, however, as a single integrated unit. In making this finding, we have considered the testimony of Professors Schneier and Morgan, presented by plaintiffs, and the record [8] as a whole. Each organization has a separate board of directors, officers, committees, constitution and bylaws. Each organization maintains exclusive control over its budget, program activity and general policy-setting process. Each organization maintains separate

and exclusive control over its professional staff and management operations. Each organization maintains separate and exclusive control over its collective bargaining determinations. The record thus shows that MCCFA, MEA and NEA are not a single integrated organization. The record also establishes that IMPACE and NEA-PAC are separate political action committees of MEA and NEA, respectively. Because membership in or contribution to IMPACE and NEA-PAC are wholly voluntary and separate from any participation in MCCFA, MEA or NEA, IMPACE and NEA-PAC are also not part of any single integrated organization.

B. General Activities of Defendant Labor Organizations

1. *MCCFA*. Since 1971, MCCFA has been the certified exclusive bargaining agent for the faculty of Minnesota's community colleges. MCCFA was actively engaged for over a year negotiating the 1973-75 collective bargaining contract with MSBCC. This accord was reached without strike or arbitration. The 1975-77 and 1977-79 contracts were also negotiated by MCCFA for approximately one year each; both resulted in arbitration proceedings and awards; and, in both cases, the Minnesota Legislature failed to fully fund the arbitration award. MCCFA also negotiated the 1979-81 contract for nearly a year. In this case, a three-week strike resulted from a refusal by MSBCC to arbitrate the dispute.

The subject matter of these negotiations by MCCFA has included teaching loads, work assignments, salaries, leave policies, grievance procedures, seniority rights, fringe benefits, grounds for dismissal and the scope of arbitration.

Roughly one-half of MCCFA's annual budget is expended on the costs of operating its 22-person Board of Directors, its Executive Committee and the salary of its president. The president chairs meetings of the Board and Executive Committee, which take place at least monthly; appoints members and serves as an ex officio member of

standing committees (Negotiations [9] Committee, Meet and Confer Committee, Legislative Committee, Professional Growth Committee, Resolutions Committee and others); chairs the negotiation teams and serves generally as the chief spokesperson of MCCFA.

The MCCFA Executive Director is salaried by the MEA, pursuant to the affiliation agreement, but is primarily involved in grievance of MCCFA claims, MCCFA contract interpretation and negotiations and other MCCFA matters.

Roughly one-fifth of the MCCFA budget is expended on its committee activities in such areas as negotiations, meet and confer, legislative matters and professional growth.

The testimony and exhibits relating to MCCFA activities clearly establish that nearly all such activities relate directly to collective bargaining, formulation of a bargaining position, contract administration or closely related organizational and professional growth.

2. *MEA*. MCCFA is affiliated with MEA, a statewide organization of local teacher affiliates that represent more than half of the public school teachers in Minnesota.

MEA assists its affiliates in virtually all areas in which they are active. MEA has departments (paid staff of MEA) and councils (volunteer teacher members who receive only expenses) in the following areas, on which well over half of the MEA budget is expended: Negotiations, Teacher Rights, Field Services (including UniServ), Instructional and Professional Development, Communications, Economic Services, and Governmental Relations. The activities of these departments and councils include training of teachers in grievance procedures, legal defense or promotion of teacher rights, research and consultation on the broad range of subjects treated in negotiations, consultation on arbitration matters, investigation of unfair labor practice charges, direct field staff assistance to local affiliates in all of the foregoing areas, researching and organizing teacher

education programs dealing with classroom skills and other professional development, and assembling insurance, travel and other group benefits. Roughly one-third of MEA's budget is expended on administration, governance and physical facilities, including offices, equipment, officer salaries and costs of Board [10] meetings and Representative Assemblies.

The testimony and exhibits relating to MEA activities clearly establish that all but an insignificant portion of such activities relate directly to collective bargaining issues such as teacher salaries, fringe benefits, size of classes, job security and other aspects of teacher welfare.

The MEA directly assisted the MCCFA during the latter organization's 1979 strike action. MEA granted MCCFA \$200,000 to maintain strike facilities, paid \$100 per week to striking faculty members after the tenth day of the strike, and, together with NEA, guaranteed approximately \$300,000 in loans to the strikers. This strike aid alone exceeded three years of MCCFA dues to MEA.

3. *NEA*. The NEA is a national teacher organization which engages in a variety of activities aimed at promoting public education, teacher welfare and improving the bargaining ability and position of its members and affiliates.

The overwhelming majority of NEA's budget expenditures relate to training teachers in grievance procedures, professional growth and skill development of teachers, technical management and other organizational assistance to its affiliates, extensive research support relating to collective bargaining issues, and direct assistance to affiliates engaged in collective bargaining.

C. Political Activity of Defendant Labor Organizations

1. NEA-PAC and IMPACE are political action arms of NEA and MEA, respectively. NEA-PAC makes contributions to the campaigns of federal candidates, and IMPACE

makes contributions to state and local candidates. The funds for such contributions are independent of dues-money and are raised through separate voluntary contributions, primarily from teachers.

2. There is some overlap of NEA-PAC activity with regular NEA organizational activity and staff, and some NEA political activity that may be only incidentally related to collective bargaining. The NEA has a rebate procedure which refunds, to each member who desires, the portion of [11] regular dues expended on political activity which does not bear directly on collective bargaining, grievance procedures and teacher welfare. Rebated costs include those related to any overlap with NEA-PAC, the preparation or dissemination of candidate ratings or any other indication of candidate preference, certain ideological or charitable activity, and other lobbying not related directly to collective bargaining or terms and conditions of employment. The rebatable amounts, as determined by NEA, have always aggregated to less than 10% of NEA dues. There was no evidence introduced showing that NEA expended more than the rebatable amounts on political activity unrelated to collective bargaining matters.

Separate from NEA-PAC and rabatable activity, NEA does engage in political activity at the federal level that the record shows relates directly to collective bargaining, education funding and other issues that are integral to teacher welfare.

3. There is some overlap between IMPACE activity and the regular MEA organizational activity and staff. For example, local government relations councils participate in screening local candidates, as does IMPACE. In addition, some MEA staff members participated in political activity on behalf of the 1976 Carter-Mondale campaign, but the evidence showed that such partisan activities, taken as a whole, would be less than 2% of MEA's total budgeted activities.

Separate from any IMPACE overlap, MEA regularly engages in political activity at the state and local levels in the areas of education funding, teacher tenure rights, class-size policy, retirement benefits and other teacher welfare concerns affected by state or local budget decisions. Through its government relations committee and department and through a coordinated program of local volunteer members, MEA organizes lobbying efforts directly related to the foregoing teacher concerns. The record establishes that such political activities relate closely and directly to the collective bargaining efforts of MEA.

4. MCCFA has engaged in political activity that the record shows relates chiefly to securing legislative approval of the employment contracts negotiated or arbitrated with the MSBCC and to other collective bargaining issues.

[12] 5. Taken as a whole, the record establishes that MEA and NEA are properly characterized as public employee organizations actively engaged in improving through collective bargaining the terms and conditions of employment for teachers, and that MCCFA is organized and affiliated with MEA and NEA to pursue similar efforts on behalf of the community college faculty it represents. All three organizations engage in a wide range of legislative, governmental and public relations activities that are closely and directly related to furtherance of each organization's collective bargaining activities. IMPACE and NEA-PAC are separate from the regular operations of MCCFA, MEA and NEA and engage in partisan political activity financed by the independent, voluntary contributions of individual teachers and others.

This finding is based on the testimony of numerous officers and staff of MCCFA, MEA and NEA concerning the character of their political activity and the proportion of their time spent on political activity of any kind, in addition to the many exhibits relating to budget allocations of each organization.

There were two types of affirmative evidence presented by the plaintiffs to show that the defendant organizations are predominantly political action organizations: (1) written or oral statements made by the defendant organizations to the effect that political action is an integral, essential element of their activities; and (2) a "content analysis" of selected publications and meeting minutes of various defendant organizations, from which it was inferred that 50-100% of each organization's activity is "political" as opposed to "collective bargaining." We find this affirmative evidence unpersuasive. It fails to distinguish between activity related to collective bargaining and political activity unrelated to that end. The content analysis in particular treats all "lobbying, organizing and litigation" matters as separate from "collective bargaining." Lobbying, organizing and litigation activities that directly relate to collective bargaining issues are thus excluded from the "collective bargaining" category of the analysis. The content analysis also assumes that the publications analyzed accurately reflect the range of activities actually undertaken by the organizations, an assumption unsupported by the record as a [13] whole. The analysis of organizational publications was also outweighed by the firsthand testimony of the officers and staff of such organizations and the budgetary and other records of their activity.

III. Faculty-Employer Relations

A. The Structure of PELRA

Pursuant to Minn. Stat. § 179.67, the MCCFA has been certified as the exclusive representative of community college faculty for purposes of collective bargaining and has negotiated four such employment contracts since 1971.

PELRA imposes upon the employer a duty to "meet and negotiate" with an exclusive representative with respect to "terms and conditions of employment," as defined in the Act, and imposes a duty to "meet and confer" with

"professional employees" with respect to employee concerns that fall outside the definition of "terms and conditions." See Minn. Stat. §§ 179.66, subds. 2 & 3, and 179.63, subds. 15, 16 & 18. PELRA further provides that, when an exclusive representative has been certified, "[t]he employer shall not meet and negotiate or meet and confer with any employee or group of employees * * * except through the exclusive representative." Minn. Stat. § 179.66.

Public employees under PELRA have a right not to join any labor organization which may be certified as their exclusive representative, but a "fair share fee" may be deducted from nonmembers and paid to the representative. Minn. Stat. § 179.65, subd. 2.

Public employees have the right to communicate with their employer with respect to terms and conditions of employment so long as such activity "does not circumvent the rights of the exclusive representative if there be one." Minn. Stat. § 179.65, subd. 1.

Professional public employees, such as plaintiffs, have the right to "meet and confer" with the employer regarding matters other than "terms and conditions" of employment. Minn. Stat. § 179.65, subd. 3.

[14] B. The Effects of PELRA in Practice

1. The 1979-81 employment contract between MCCFA and MSBCC provides *inter alia* that:

a. "The Employer will not interfere with the rights of employees to become or not to become members of [MCCFA] and there shall be no discrimination or interference, restraint, or coercion by the Employer * * * against any employee because of [MCCFA] membership or non-membership[;]"

b. The MCCFA has the sole right to "establish" up to six faculty committees at each campus for the purpose of holding "exchange of views" meetings with the college

administration in the areas of "Personnel, Student Affairs, Curriculum, Facilities, Fiscal Matters, and General Matters;" and "[e]ach committee will have full authority in the assigned area to present the views of the employees" in such meetings;

c. Alternative structures for exchanging views may be agreed to by the campus chapter of MCCFA but "such agreement shall not in any way regulate or control the right of selection or participation by the local [MCCFA] association;"

d. A statewide-level "meet and confer" committee shall also be established by the statewide MCCFA, shall meet with the MSBCC at least three times per year, and shall include as subjects "all items submitted by the State [MCCFA];"

e. Statewide and campus faculty representatives for contract administration matters are designated by the statewide or local MCCFA;

f. Class-size issues shall be resolved "through the exchange of views process;"

g. The academic year and summer school calendar shall be established by a committee comprised of the college president, student body president and campus MCCFA president;

h. The designation of academic departments and the responsibilities of "department coordinators" shall be determined through the exchange of views process;

[15] i. Employee "complaints" may be presented to administrators with or without participation of the MCCFA grievance representative; formal grievances must be signed by the affected employee and the MCCFA grievance representative; and

j. The employer "will not during the life of this contract meet and negotiate or meet and confer relative to

terms and conditions of employment with any employee or group of employees * * * except through the exclusive bargaining representative."

2. Prior to the implementation of PELRA, the faculty of at least some community college campuses were organized in "faculty senates or councils," with various committees thereof focusing on such subject areas as new course proposals and other curriculum matters, degree requirements, student activity budgets, academic standards and related discipline procedures for students, teacher evaluation and general budget and planning issues at each such campus.

The faculty senates or councils and committees thereof, together with general faculty assemblies, were the primary formal mechanism for formulating faculty views and communicating such views to the administration. Faculty representatives in this formal system were selected by election processes in which every faculty member was eligible to vote and seek election.

3. Since PELRA was adopted, "meet and confer" and "exchange of views" committees (hereafter, meet and confer) have replaced faculty senates and councils and are the principal formal mechanisms, at the campus and statewide levels, for formulating faculty positions on their concerns. The subjects covered by the meet and confer system include new course proposals and other curriculum matters, budgetary planning, development of facilities, student rights and student affairs generally, evaluation of administrators, selection of college presidents, academic accreditation of the community colleges, and other matters.

4. The degree and effectiveness of faculty organization varied from campus to campus prior to PELRA. The duty to "meet and confer," however, requires administrators at each [16] campus to listen to and consult with the faculty on policy questions other than "terms and conditions of

employment." Together with the establishment of "meet and confer" committees, the duty imposed by PELRA has made the formal meet and confer process the primary mechanism for any significant faculty-administration communication on such policy questions.

5. The views of a faculty meet and confer committee are considered by administrators to be the official faculty position on matters discussed in meet and confer sessions, but the administrators recognize that there are other positions held by individual faculty members.

6. No community college administrator or MSBCC member plays any role in the selection of the members on the faculty's meet and confer committees.

7. Pursuant to the employment contract, the MCCFA has exclusive control over designation of all faculty members on meet and confer committees at the campus and statewide level. Although there is no express policy against including nonmembers of MCCFA on such committees, in practice nonmembers have not been designated to serve in such roles.

8. Regardless of membership or nonmembership in MCCFA, all faculty have the right to informally communicate their individual views to administrators and the MSBCC and MCCFA have never attempted to deny or abridge such rights. The exclusive formal process for formulating and communicating a collective faculty position on policy questions, however, is through the meet and confer committees.

9. There are few formal rules with respect to determining which faculty members may appear before or present proposals to the meet and confer committees. In practice, however, committee members determine the agenda and focus of faculty expressions and committee meetings are not a general forum for individual faculty members or others to discuss matters of interest to them.

[17] IV. First Amendment and State Interests

A. Associational Interests

1. The decision to join or contribute to IMPACE or NEA-PAC is wholly an individual, voluntary one. This record is devoid of any evidence that the plaintiffs have been required or in any manner coerced into supporting, joining, or refraining from opposing the efforts of IMPACE or NEA-PAC.

2. The only statutorily-imposed relationship between plaintiffs and MCCFA, MEA and NEA involves the deduction of a fair share fee from the plaintiffs that is paid to MCCFA as the exclusive bargaining representative of community college faculty, a portion of which is paid to MEA and NEA for various collective bargaining and related assistance the latter groups provide to MCCFA.

3. To obtain or retain their faculty positions, or to derive the economic, job security and other benefits under the "terms and conditions" (as defined by PELRA) of their employment, the plaintiffs have not been and are not required or coerced into joining, or refraining from opposing, MCCFA, MEA or NEA. Such rights and benefits flow equally to all faculty members regardless of their membership or nonmembership in MCCFA.

4. The ability of the plaintiffs to participate in the meet and confer process, and to serve on meet and confer committees, is impaired by nonmembership in MCCFA as follows: The employment contract provides MCCFA with exclusive control over the selection of faculty members on meet and confer committees; such committee members have principal control over formulating the agenda of faculty concerns and the adoption of faculty views; and nonmembers of MCCFA have not been, in practice, selected for participation on such committees.

5. Having the opportunity to fully participate in the meet and confer process is viewed by some plaintiffs as

essential to their role on the faculty. Some plaintiffs felt pressure to join the MCCFA in order to have such an opportunity and at least one plaintiff joined MCCFA for this reason.

[18] 6. No evidence was introduced demonstrating that service on meet and confer committees was available equally to members and nonmembers of MCCFA.

B. Free Speech Interests

1. The right of all faculty, both members and nonmembers of MCCFA, to communicate informally and individually with administrative officials has not been impaired by the MCCFA, MEA, NEA or the MSBCC.

2. Certain rights that might be characterized as elements of academic freedom are expressly protected by the employment contract, *e.g.*, the right of faculty members to select their course materials and text books, to choose their methods of teaching, to research and publish their work, to evaluate student performance and to select library materials.

3. There is a potential for impairing free speech rights arising from MCCFA's exclusive control over selection of faculty members on the meet and confer committees, as follows: A faculty member could be inhibited from speaking out against MCCFA generally or against particular issue positions strongly held by MCCFA because it might be feared that such action could result in exclusion from serving on the meet and confer committees.

The plaintiffs have not demonstrated that MCCFA selections of meet and confer committee members have in any way been conducted to "retaliate" in such a manner, nor that any faculty member's exercise of free speech has been impaired in practice by virtue of this potential inhibition.

4. The plaintiffs have failed to demonstrate any direct, indirect, actual or potential impairment of their associa-

tional and free speech rights, except as indicated in Findings IV(A) (4-5) and (B)(3).

C. State Interests

1. The parties have stipulated to a number of state interests that independent review of the record establish as true and relevant to these proceedings:

[19] a. The State of Minnesota has a legitimate interest in promoting orderly and constructive relationships between public employers and employees. Unresolved disputes between public employers and their employees are detrimental to the public interest as well as to the interests of the involved parties.

b. The State of Minnesota has determined that enactment of the Public Employment Labor Relations Act is the means by which it can best deal with its employees in a fair, efficient and peaceful fashion.

c. A statutory system which permits employees in a unit to be represented by an exclusive representative results in the avoidance of confusion, conflicting demands, and dissension that would result from more than one representative claiming to represent all the employees in an employee unit.

d. The State of Minnesota has a legitimate interest in maintaining "labor peace" by entering into agreements with an exclusive representative for each employee unit, which agreements are not subject to direct challenge by rival employee organizations claiming to represent the same employees in each unit.

2. Creating a procedure for systematic expression of faculty views on a broad range of campus policy questions furthers each of the foregoing state interests.

3. The record does not demonstrate, nor does the State of Minnesota assert, any state interest in allocating the

benefits and obligations of the exclusive representation collective bargaining system in a manner which discriminates between members and nonmembers of the employee organization.

4. Additional state interests appear on the face of and by inference from the PELRA statute, which therefore need not be set forth here.

[20]

ORDER

1. Each party to this proceeding shall submit proposed conclusions of law based upon the facts as found herein on or before December 9, 1981.

2. Each party may submit a memorandum of points and authorities in support of their position, together with their proposed conclusions. Such memorandum shall not exceed twenty-five (25) pages in length.

3. Final oral argument will be December 16, 1981 at 2:30 o'clock p.m.

/s/ Gerald W. Heaney
GERALD W. HEANEY
United States Circuit Judge

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

/s/ Earl R. Larson
EARL R. LARSON
U. S. Senior District Judge

DATED: November 16, 1981.

**OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT,
535 F.2d 466**

(17 May 1976)

LEON W. KNIGHT, ET AL., *Petitioners,*

v.

THE HONORABLE DONALD D. ALSOP, District Judge,
United States District Court for the District of Minnesota,
Respondent.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 76-1051

Submitted March 11, 1976.

Decided May 17, 1976.

Faculty members employed by community colleges brought action challenging constitutionality of state's Public Employee Labor Relations Act. Following denial of motion to convene three-judge court, faculty members sought mandamus. The Court of Appeals, Stephenson, Circuit Judge, held that mandamus was proper remedy; that the complaint raised sufficiently substantial constitutional questions to require convening of three-judge court; and that complaint formally alleged basis for equitable relief.

Writ granted.

• • • • •

[467] Before LAY, ROSS and STEPHENSON, *Circuit Judges.*

STEPHENSON, *Circuit Judge.*

The critical issue raised in this case is whether a three-judge court should have been convened under 28 U.S.C. §§ 2281 and 2284. Petitioners request a writ of mandamus pursuant to 28 U.S.C. § 1651 and Fed.R.App.P. [468]

21 directing the district court¹ to convene a three-judge court. For the reasons stated below, we conclude that the district court exceeded its jurisdiction in denying petitioners' motion to convene a three-judge court and grant the petition for writ of mandamus.

Twenty faculty members (petitioners) employed by various Minnesota community colleges initiated this action contending that the Minnesota Public Employee Labor Relations Act (PELRA), Minn.Stat. Ann. § 179.61 *et seq.*, contravenes the United States Constitution and 42 U.S.C. §§ 1983, 1985(3), 1986 and 1994. In particular, the petitioners assert that the exclusive representation² and fair share³ provisions of the PELRA, on their face and as applied, are violative of the First, Ninth, Tenth, Thirteenth and Fourteenth Amendments. The amended complaint named as defendants, respondents, the Minnesota Community College Faculty Association (MCCFA), an employee organization certified as the exclusive representative of petitioners under the PELRA; its affiliates, the National Education Association (NEA), the Minnesota Education Association (MEA) and the Independent Minnesota Political Action Committee for Education (IMPACE); various officers and former officers of the unions; and officials of the state of Minnesota who administer the PELRA.

None of the petitioners is either a member or supporter of the unions nor desires any representation by them. Ostensibly, the MCCFA through the PELRA has the authority to act as the petitioners' exclusive representative

¹ The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota.

² Minn.Stat. Ann. §§ 179.63(1)-(7), (15)-(18); 179.64(7); 179.-65(1)-(2), (4)-(5), (7); 179.66(2), (7)-(10); 179.67; 179.68(1), (2), (5)-(6), (9), (11); 179.69; 179.70; 179.71(2)-(4), (5), (6)-(7); 179.72(3), (6)-(7), (9), (12); 179.74(3)-(5).

³ Minn.Stat. Ann. § 179.65(2).

in collective bargaining with the Minnesota State Board for Community Colleges (Board) concerning terms and conditions of employment in the community college system. Essentially, the petitioners allege that the PELRA denies the right to bargain with the Board on an individual level and prohibits an individual from petitioning the Board with regard to employment matters.

Furthermore, during the academic years 1973-1974, 1974-1975, and 1975-1976, the MCCFA apparently has caused fair share fees to be deducted by the Board from the petitioners' wages in amounts equal to 94-97% of the formal membership dues levied by the MCCFA during those years. The petitioners in this regard further contend that such fees have been deducted or checked off without notice or hearing and without a determination that expenditure of the fees confers any benefit on the petitioners. It is also asserted that some of the fees have been transferred by the MCCFA to the NEA, the MEA and IMPACE.

[1] The amended complaint requested a declaration that the exclusive representation and fair share schemes are constitutionally invalid and injunctive relief restraining the unions and state officials from enforcing the applicable provisions of the PELRA. In their amended complaint, the petitioners also requested that a three-judge court be convened pursuant to 28 U.S.C. §§ 2281 and 2284. On December 22, 1975, after oral argument the district court issued a memorandum opinion and order denying the motion for a three-judge court. The district court held that the petitioners' allegations concerning the exclusive representation aspect of the PELRA failed to constitute a substantial federal constitutional question.⁴ Although the petitioners'

⁴ On a motion to convene a three-judge court, a single district judge may determine whether the constitutional question is substantial, whether the complaint formally alleges a basis for equitable relief, and whether the case otherwise comports with the

[469] contention surrounding the fair share fee was found to present a substantial constitutional question, the district court determined that injunctive relief against state officials was not necessary with respect to that claim.

[2-4] A threshold consideration is whether the district court's refusal to convene a three-judge court is reviewable through a petition for writ of mandamus.⁵ The remedy of mandamus is typically available only in circumstances in which the district court exceeds "the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104, 88 S.Ct. 269, 278, 19 L.Ed.2d 305, 315 (1967). See *In re Cessna Aircraft Antitrust Litigation*, 518 F.2d 213, 216-17 (8th Cir.), cert. denied, 423 U.S. 947, 96 S.Ct. 363, 46 L.Ed. 2d 282 (1975); *Pfizer, Inc. v. Lord*, 456 F.2d 545, 547-48 (8th Cir. 1972). The writ is an extraordinary remedy that is to be granted when the lower court has committed a "clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 85 S.Ct. 234, 238, 13 L.Ed.2d 152, 159 (1964). See *Pfizer, Inc. v. Lord*, 522 F.2d 612, 614-15 (8th Cir. 1975). Despite the limited availability of the mandamus remedy, we conclude that the ruling of the district court is reviewable through mandamus. In *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 n. 19, 95 S.Ct. 289, 295, 42 L.Ed. 2d 249, 258 (1974), the Supreme Court clearly indicated that "Where a single judge refuses to request

requirements for a statutory three-judge court. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962). A single judge may also determine whether there is a statutory claim that is dispositive of the case. See *Hagans v. Lavine*, 415 U.S. 528, 543-44, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577, 591 (1974).

⁵ Since the district court retained jurisdiction, this is not a case arising from an appealable order. Cf. *Majuri v. United States*, 431 F.2d 469, 472 (3d Cir.), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970). Further, petitioners did not request certification for appeal under 28 U.S.C. § 1292(b) of the district court's order.

the convention of a three-judge court, but retains jurisdiction, review of his refusal may be had in the court of appeals * * * through petition for writ of mandamus * * *." See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715, 82 S.Ct. 1294, 1296, 8 L.Ed.2d 794, 796 (1962); see also *Schackman v. Arnebergh*, 387 U.S. 427, 87 S.Ct. 1622, 18 L.Ed.2d 865 (1967). In this particular instance, judicial economy can be served by exercising the "supervisory control of the District Courts * * * necessary to proper judicial administration in the federal system." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60, 77 S.Ct. 309, 315, 1 L.Ed.2d 290, 299 (1957). See J. Moore & B. Ward, 9 Moore's Federal Practice ¶ 110.-28, at 312-13 (1975 & Supp.). The writ of mandamus is an appropriate method "to confine [the district court] to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185, 1190 (1943).

Accordingly, we must proceed to determine whether the district court acted in excess of its jurisdiction or committed a clear abuse of discretion in refusing to convene a three-judge court under the circumstances of the instant case.

The district court, relying on *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), concluded that the petitioners' constitutional claims concerning the exclusive representation scheme failed to present a substantial federal constitutional question. We, however, disagree with its holding that *Hanson* rendered petitioners' claims wholly insubstantial.

[5] It is well established that a three-judge court need not be convened when the issues presented have been settled beyond question. The Supreme Court in *Bailey v. Patterson*, 369 U.S. 31, 33, 82 S.Ct. 549, 551, 7 L.Ed.2d 512, 514 (1962), has expressly stated that 28 U.S.C. § 2281 "does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent." Moreover, in *Goosby v. Osser*, 409 U.S. 512,

518, 93 S.Ct. 854, 858, 35 L.Ed.2d 36, 42 (1973), the Court equated "constitutional insubstantiality" with such concepts as "essentially fictitious," "wholly insubstantial," "obviously frivolous," and "obviously without merit." The Supreme Court concluded:

[470] The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if " 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' "

Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 859, 35 L.Ed.2d 36, 42 (1973), quoting from *Ex parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3, 4, 78 L.Ed. 152, 153 (1933). See also *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-06, 53 S.Ct. 549, 550, 77 L.Ed. 1062, 1064 (1933); *Hannis Distilling Co v. Baltimore*, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482, 483 (1910); *McGivra v. Ross*, 215 U.S. 70, 80, 30 S.Ct. 27, 31, 54 L.Ed. 95, 101 (1909). Under the test announced in *Goosby v. Osser*, *supra*, we conclude that *Hanson* is not a prior decision of the Supreme Court that "foreclose[s] the subject" of petitioners' constitutional attack upon the Minnesota exclusive representation scheme. Similarly, it is not a decision that "leave[s] no room for the inference that the questions sought to be raised [by petitioners] can be the subject of controversy."

In *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Supreme Court

confirmed the validity of union shop agreements negotiated according to congressional authorization in the Railway Labor Act of 1926 (RLA), 45 U.S.C. §§ 151-63, against challenges grounded on the First and Fifth Amendments. Under the RLA, union shop agreements could condition union membership on the payment of "periodic dues, initiation fees, and assessments." 45 U.S.C. § 152, Eleventh. The Supreme Court held that such a condition, on its face, neither denied union employees of their right to work as ensured by the due process clause of the Fifth Amendment nor interfered with their right of free speech or freedom of association as secured by the First Amendment. *Id.* at 227-38, 76 S.Ct. at 715-721, 100 L.Ed. at 1128-1134. In so holding, however, the Court predicted:

[I]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. * * * We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work * * * does not violate either the First or the Fifth Amendments.

351 U.S. at 238, 76 S.Ct. at 721, 100 L.Ed. at 1134. The Supreme Court in *Hanson* emphasized that it was approving exclusively union shop agreements which condition union membership on the payment of union dues, fees and assessments utilized to defray the costs of collective bargaining. *Id.*

[6, 7] The petitioners' constitutional challenge to the exclusive representation scheme of the PELRA is distinct from *Hanson*. The essence of petitioners' allegation⁶ con-

⁶ The existence of a substantial constitutional question is determined by the contentions of the complaint, and the allegations of the complaint are assumed true. *Boddie v. Connecticut*, 401 U.S. 371, 373, 91 S.Ct. 780, 783, 28 L.Ed.2d 113, 116 (1971).

cerning exclusive representation relates to their unwillingness to accept a union organization as their sole bargaining representative for the purpose of negotiating and administering collective agreements with the Minnesota Community Faculty Association. Correspondingly, the petitioners contend that the PELRA prohibits an individual from petitioning the Minnesota State Board for Community Colleges with regard to employment conditions. In contrast, the Supreme Court in *Hanson* was confronted with an attack on the RLA, which allows [471] for exclusive representation similar to that of the PELRA, but it did not resolve the validity of such a scheme. See 45 U.S.C. § 152, Fourth. Furthermore, the Court's decision in *Hanson* was rendered in a private rather than public sector collective bargaining context. Collective bargaining in public employment has been considered different from collective bargaining in private employment.⁷ See *Winston-Salem/Forsyth County Unit v. Phillips*, 381 F.Supp. 644, 647 (M.D.N.C.1974). See Generally Blair, *Union Security Agreements in Public Employment*, 60 Cornell L.Rev. 183 (1975); Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974).⁸

We conclude that the district court acted beyond its jurisdiction in denying petitioners' motion to convene a three-judge court under 28 U.S.C. § 2281. *Hanson* does not "foreclose the subject" of petitioners' challenge to the exclusive representation scheme of the PELRA. There is "room for the inference that the questions sought to be raised [by

⁷ The district court recognized but rejected the distinction between public and private collective bargaining.

⁸ We note that the Supreme Court has granted review in a case involving a constitutional challenge to the validity of a Michigan public collective bargaining statute. See *Abood v. Detroit Board of Education*, 60 Mich.App. 92, 230 N.W.2d 322 (1975), *prob. juris. noted*, — U.S. —, 96 S.Ct. 1723, 48 L.Ed.2d 192, 44 U.S.L.W. 3603, 3608, (U.S. April 27, 1976).

petitioners] can be the subject of controversy.” *Goosby v. Osser, supra*, 409 U.S. at 518, 93 S.Ct. at 859, 35 L.Ed.2d at 42. We, of course, neither decide nor express any view on the merits of this case.

[8, 9] In summary, we are satisfied that all formal requirements for a three-judge court which are determinable by a single judge exist with regard to the exclusive representation scheme of the PELRA.⁹ Since it has been determined that a substantial federal constitutional question has been presented and that a three-judge court should be convened, it is unnecessary to reach the remaining question of whether the complaint formally alleges a basis for equitable relief with respect to the fair share provision of the PELRA. The petitioners’ allegation concerning the fair share provision may be considered by the three-judge court as a pendent claim.¹⁰

The petition for writ of mandamus to compel the convention of a three-judge court is granted.

⁹ Although the district court did not reach the issue of whether the complaint formally alleges a basis for equitable relief with regard to the exclusive representation scheme, we have necessarily decided the question in the affirmative.

¹⁰ Following the district court’s order of December 22, 1975, the Minnesota Supreme Court held that the fair share provision of the PELRA was not violative of due process. See *Robbinsdale Education Ass’n v. Robbinsdale Federation of Teachers, Local 872*, 239 N.W.2d 437 (Minn. 1976). On March 31, 1976, the Minnesota Legislature enacted Minn.H.F. No. 2244, amending Minn.Stat. Ann. § 179.65(2), which significantly alters the manner in which fair share fees are assessed and possibly renders this claim moot.

**MEMORANDUM OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA**

(22 December 1975)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, ET AL, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
ET AL, *Defendants*.

MEMORANDUM AND ORDER

Plaintiffs are faculty members employed by several Minnesota community colleges and have instituted the present action alleging that the Minnesota Public Employee Labor Relations Act of 1971, Minn. Stat. Ch. 179, (PELRA) violates the United States Constitution and 42 U.S.C. §§ 1983, 1985(3), 1986 and 1994. Specifically, plaintiffs attack the exclusive representation¹ and fair share² provisions of the PELRA on the grounds that they violate the First, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution.

[2] Defendants are the Minnesota Community College Faculty Association, which is an employee organization certified as the "exclusive representative"³ of the plaintiffs under M.S.A. § 179.67; its affiliates, the National Edu-

¹ M.S.A. §§ 179.63, Subds. 1-7, 15-18; 179.64, Subd. 7; 179.65, Subds. 1-2, 4-5, 7; 179.66, Subds. 2, 7-10; 179.67; 179.68, Subds. 1, 2, 5-6, 9, 11; 179.69; 179.70; 179.71, Subds. 2-4, 5(a-e, g-j), 6-7; 179.72, Subds. 3(b), 6-7, 9, 12 and 179.74, Subds. 3-5.

² M.S.A. § 179.65, Subd. 2

³ M.S.A. § 179.63, Subd. 6.

cation Association, the Minnesota Education Association, and the Independent Minnesota Political Action Committee for Education; various officers and former officers of the latter union defendants; and principal officials of the State of Minnesota.

In their complaint, plaintiffs request that a three-judge court be convened pursuant to 28 U.S.C. § 2281 and 2284. Presently before the court are motions by the plaintiffs and the defendants relating to that request. Defendants have made a motion to stay or dismiss, and in response, plaintiffs have moved for the convening of the statutory three-judge court.

None of the plaintiffs are members or supporters of any of the defendant organizations and do not desire any form of representation by them. Nonetheless, the Minnesota Community College Faculty Association (hereinafter "Association"), under color of the PELRA, allegedly claims the authority to act as the exclusive representative for the plaintiffs in collective bargaining with the Minnesota State Board for Community Colleges (hereinafter "Board") with respect to terms and conditions of employment in the community college system. Plaintiffs contend that under color of the PELRA, they have been and will be denied any right, power, or privilege to bargain or to contract with the Board on their own behalf, or to petition the Board on employment matters within the purportedly exclusive jurisdiction of the Association.

During the academic years 1973-74 and 1974-75, the Association has allegedly caused "fair share" fees to be deducted by the Board from the plaintiffs' wages in amounts equal to 94-97% of the formal membership dues levied by the Association during those years. Such fees have been checked-off without notice, hearing, or any form of governmental oversight or review. It is further alleged that some of the fees have been transferred by the Association to the National Education Association, the Minnesota Educa-

tion Association and the Independent Minnesota Political Action Committee for Education.

[3] It is well established that when an application for a statutory three-judge court is addressed to a district court, the single judge's inquiry is limited to determining, (1) whether the constitutional question is substantial, (2) whether the complaint at least formally alleges a basis for equitable relief, and (3) whether the case otherwise comes within the requirements of the three-judge statute. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Potter v. Meier*, 458 F.2d 585 (8th Cir. 1972); *Abele v. Markle*, 452 F.2d 1121, 1125 (2d Cir. 1971); See Nielsen, Judge, *Three-Judge Courts: A Comprehensive Study*, 66 F.R.D. 495, 506 (1975).

A recently developed exception to this general rule arises when a statutory claim is appended to the constitutional claim. In that circumstance, the district court judge must make a determination of the statutory claim and if it is dispositive of the case he need not invoke the machinery of a three-judge court. See *Hagans v. Lavine*, 415 U.S. 528, 543-44 (1974); *Rosado v. Wyman*, 397 U.S. 397, 403 (1970). Of course, if the single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue. *Hagans v. Lavine*, *supra* at 544.

No statutory claim is made which could dispose of the present case.

The enjoining of the enforcement of a state statute by a three-judge court is an "... extraordinary step" *Toomer v. Whitsell*, 334 U.S. 385, 391 (1948). The seriousness of this procedure has led to the "... oft-repeated admonition that the three-judge court statute is to be strictly construed." *Board of Regents v. New Left Education Project*, 404 U.S. 541, 545 (1972) (citing *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Phillips v. United States*, 312 U.S. 246 (1941)).

Defendants' motion to stay or dismiss on the grounds of abstention becomes necessarily intertwined with the request for a three-judge court and is considered in examining the requisites for a three-judge court.⁴

[4] Substantial Constitutional Question

Federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and insubstantial as to be absolutely devoid of merit," *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904); "wholly insubstantial," *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); "obviously frivolous," *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); "plainly unsubstantial," *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933); or "no longer open to discussion," *McGivra v. Ross*, 215 U.S. 70, 80 (1909).

The general test as applied to the convening of a three-judge court was set forth in *Goosby v. Osser*, 409 U.S. 512 (1973), where the Court stated:

"Title 28 U.S.C. § 2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson*, 369 U.S., at 33, 82 S.Ct. at 551, 'wholly insubstantial,' *ibid.*; 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910); and 'obviously without merit,' *Ex parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3, 4-5, 78 L.Ed. 152 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the

⁴ Defendant state officials have made an additional argument concerning the necessity of enjoining state officials. This argument is likewise considered in examining the requisites of a three-judge court.

substantiality of constitutional claims, those words impart that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' *Ex parte Poresky, supra*, at 32, 54 S.Ct. at 4, quoting from *Hannis Distilling Co. v. Baltimore, supra*, 216 U.S. at 288, 30 S.Ct. at 327; see also *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-106, 53 S.Ct. 549, 550, 77 L.Ed. 1062 (1933); *McGivra v. Ross*, 215 U.S. 70, 80, 30 S.Ct. 27, 31, 54, L.Ed. 95 (1909)."

Id. at 518.

Plaintiffs' Amended Complaint alleges three separate federal claims, which may be fairly summarized as follows:⁵

[5] I. That the system of exclusive representation created by the PELRA (including the "fair-share" scheme) is repugnant, on its face and as applied, to the First, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution.

II. That the "fair share" provision, considered independently, is repugnant, on its face and as applied, to the latter Amendments.

III. That even if the entire system of exclusive representation is constitutional on its face in all its particulars, and could be applied to the plaintiffs in a constitutional

⁵ Plaintiffs Memorandum of Points and Authorities in Support of Their Motion to Convene a Statutory Three-Judge Court, pp. 6-7.

manner, nevertheless its past and threatened application by the defendant organizations violates federal statutes which protect plaintiffs' constitutional rights.

Specific issues raised by plaintiffs' claims are as follows:

A. Plaintiffs allege that a portion of their "fair share" fees are being expended for political activities. (Amended Complaint, ¶¶ 22, 30, 34 (E,G,H.(3))). The unambiguous language of the statute clearly does not permit the collecting of fees for those purposes. M.S.A. § 179.65, Subd. 2 provides in relevant part:

"In no instance shall the required contribution [fair share fee] exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures."

Plaintiffs are challenging the statute on grounds of unconstitutionality. 28 U.S.C. § 2281. Such attack is clearly insubstantial where the statute itself does not permit the conduct complained of. Plaintiffs would be able to recover any contribution which was collected and used contrary to the terms of the statute.

B. Plaintiffs allege that the "fair share" fee is being deducted:⁶

- 1) without notice;
- 2) without a timely hearing before judicial officers or tribunals;
- [6] 3) without timely judicial review;
- 4) in an amount determined by the Association's arbitrary criteria of necessity and propriety; and
- 5) without reference to any objective or rational standards.

⁶ Amended Complaint ¶ 38.

The authorities cited by defendants do not foreclose the plaintiffs' constitutional challenge on due process grounds. On the contrary, the procedural due process questions raised by the plaintiffs are substantial. The assessment of fees under such circumstances, without any notice or hearing raises serious constitutional questions. *See Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 305 U.S. 327 (1963).

C. Plaintiffs assert that exclusive representation in public employment violates their constitutional rights under the First and Fourteenth Amendments. The constitutionality of a similar provision was challenged in *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). In *Hanson*, the Supreme Court unanimously upheld the union shop provision of the Railway Labor Act (45 U.S.C. § 152, Eleventh), which permitted the execution of collective bargaining agreements containing clauses requiring both that employees become members of the exclusive bargaining agent within 60 days, and that those employees subsequently pay the periodic dues, initiation fees and assessments uniformly required as a condition of acquiring or retaining membership. The Court held that the requirement for financial support of the collective-bargaining agency by all who received the benefits of its work was within the power of Congress under the Commerce Clause and did not violate either the First or Fifth Amendments. *Id.* at 238.

Likewise, the PELRA only assesses a fee for specific limited services provided by the exclusive representative. M.S.A. § 179.65, Subd. 2 provides in pertinent part:

"In no instance shall the required contribution [fair share fee] exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures."

[7] Moreover, the PELRA does not require the employees to become *members* of any labor or employee organizations. It specifically provides that employees "... shall have the right not to form and join such [labor or employee] organizations." M.S.A. § 179.65, Subd. 2. Rather, the PELRA only seeks to impose a requirement of financial support of the representative by all who receive the benefits of its efforts.

Although the facts of *Hanson, supra*, indicate that those challenging the provisions were employed by the private sector (the Union Pacific Railroad Co.) and not by the public sector (*e.g.* State of Minnesota) the court is convinced that such distinction does not lessen its precedential nature to the existing case. The arguments advanced in *Hanson* and the rationale of the Court are revealing. The Court stated:

"Wide ranged problems are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights. It is said that once a man becomes a member of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology. On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." [Footnotes omitted] 351 U.S. at 236-238.

The court concludes that the PELRA is legislation well within the dictates of *Hanson* and plaintiffs' constitutional attack based on the First and Fourteenth Amendments is "obviously without merit" and does not present a substantial constitutional question.

That *Hanson* was decided under the Fifth, and not under the Fourteenth Amendment is inconsequential. The Supreme Court has stated, "The restraint imposed upon legislation by the due process clauses of the two amendments is the same." *Heiner v. Donnan*, 285 U.S. 312, 326 (1932), citing *Coolidge v. Long*, 282 U.S. 582, 596 (1931).

[8] D. Plaintiffs' claims also seek to raise substantial constitutional questions under the Ninth,⁷ Tenth⁸ and Thirteenth⁹ Amendments. After carefully reviewing plaintiffs' claims and the authorities cited by both plaintiffs and defendants the court concludes that such claims are "obviously without merit" and do not raise a substantial constitutional question.

Basis for Equitable Relief

Plaintiffs contend that the Amended Complaint sets forth an adequate basis for equitable relief on the grounds that irreparable injury necessarily arises from statutory impositions upon First Amendment freedoms. The court has concluded that a substantial constitutional question is not presented by plaintiffs' First Amendment claims.

The court still must determine whether there is a basis for equitable relief on the "fair share" claim which does present a substantial constitutional question.

⁷ Such Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed as to deny or disparage others retained by the people."

⁸ The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

⁹ The Thirteenth Amendment states:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

A single judge is empowered to determine whether an application for injunctive relief alleges facts which, if taken as true, adequately demonstrate irreparable injury and an inadequate remedy at law. *Pierre v. Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965); *Harrington v. Arceneaux*, 367 F. Supp. 1268, 1270 (W.D. La. 1973); *Hill v. Nelson*, 272 F. Supp. 790 (N.D. Calif. 1967); *Duncombe v. State of New York*, [9] 267 F. Supp. 103 (S.D. N.Y. 1967). Although the judge's role is limited, it is not merely ministerial. The language of *Idlewild* ("at least formally allege a basis for equitable relief," 370 U.S. at 715) is not necessarily overly restrictive. It is still the single judge's duty

. . . . to examine the complaint for substantial allegations which would support a claim for injunctive relief, and not to look merely at the prayer for relief and the conclusive allegation of irreparable injury. *Majuri v. United States*, 431 F.2d 469, 473 (3rd Cir.) *cert. denied*, 400 U.S. 943 (1970).

See also *Pederson v. Brier*, 327 F. Supp. 1382, 1385 n.3 (E.D. Wis. 1971). In addition, since the refusal to convene a three-judge court is an order reviewable by the Court of Appeals, *Gonzalez v. Employees Credit Union*, 419 U.S. 90, 103 (1974), the single judge need not respond with a "conditioned reflex" everytime an application is made. *Majuri*, *supra* at 474.

It is well established that the basis of injunctive relief in the federal courts has always been irreparable injury and inadequacy of legal remedies. *Younger v. Harris*, 401 U.S. 37 (1971); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

Plaintiffs' allegation that the deduction of the "fair-share" fee violates their procedural due process rights presents a substantial constitutional question. However, the facts do not indicate that the plaintiffs are suffering or

will suffer irreparable injury and that there is an inadequate remedy at law.

Plaintiffs' injury is pecuniary. Such injury can be compensated by an award of money damages. *See Frischman v. Durand*, 350 F. Supp. 79 (S.D. N.Y. 1972). A remedy at law does exist for the plaintiffs by which they can recover the fees collected in violation of their constitutional rights. *Cf. 11 Wright & Miller* § 2944, p. 396 (1973).

[10] Plaintiffs have not indicated that the defendant Association is not financially responsible so as to preclude the recovery of money damages.

Since there is no basis for granting equitable relief because of the lack of irreparable injury and the existence of an adequate remedy at law, the jurisdiction to maintain a three-judge court is lacking, even though a substantial constitutional question exists on the deduction of the "fair-share" fee. *See Majuri v. United States. supra*, at 472; *Three-Judge Courts: A Comprehensive Study, supra*, at 501-502.

The court has further concluded that a substantial constitutional question is not presented by any of the other claims asserted by the plaintiffs, hence it need not examine the basis for equitable relief for those claims as they relate to the three-judge court motion.

Requirements of the Statute

28 U.S.C. § 2281 provides in relevant part:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute *by restraining the action of any officer of such State* in the enforcement or execution of such statute . . . , shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefor is heard

and determined by a district court of three judges under section of 2284 of this title. [emphasis added]

Even assuming that plaintiffs' claim for relief of the "fair-share" provision did state a basis for equitable relief, such relief could be granted without resorting to the extraordinary remedy of enjoining state officials. The defendant Association could be enjoined from collecting the fees, thereby protecting the rights of the plaintiffs without needlessly interfering with the activities of the state officials.

The court has determined that the other claims advanced by the plaintiffs do not present a substantial constitutional question. Thus it need not rule on the necessity of enjoining state officials with regard to those claims.

Since proper relief could be rendered without enjoining state officials, the plaintiffs have failed to comply with the terms of § 2281, a necessary requisite in convening a three-judge court.

[11] Abstention Issue

Defendants have moved for a stay or dismissal of the proceedings on the grounds that appropriate and effective remedies for authoritative interpretation of the statutes may be obtained in the state courts. Defendants contend that a state court interpretation might alter or modify the federal constitutional questions before the federal court.

A number of actions are pending in Minnesota State District Courts challenging the constitutionality of various aspects of the PELRA, particularly the "fair-share" provision. Recently appealed to the Minnesota Supreme Court was a decision by a Hennepin County District Court Judge declaring that the "fair-share" provision as contained in M.S.A. § 179.65, Subd. 2 violates due process of law and is therefore unconstitutional under both the State and Federal Constitutions. (*Robbinsdale Education Association et al v. Robbinsdale Federation of Teachers Local 872; and*

Independent School District 281, File No. 710101 (Hennepin County District Court, Aug. 13, 1975)).

It is possible that the "fair-share" provision could be declared unconstitutional under the State Constitution by the Minnesota Supreme Court. Such determination would obviate the necessity of ruling on the provision under the Constitution of the United States. See *Askew v. Hargrave*, 401 U.S. 476, 478 (1971); *Wisconsin v. Costineau*, 400 U.S. 433, 440 (1971) (dissenting opinion); *Reetz v. Bozanich*, 397 U.S. 82 (1970).

However, the decision of whether or not to abstain is not to be made by the single judge court. Its inquiry upon application for a three-judge court is limited to the jurisdictional criteria. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, *supra*, at 715.

Judge Nielsen, in his article on three-judge courts stated:

Unlike the decision of the three-judge panel, the single judge's review is preliminary and limited to applying the prerequisites for convening a three-judge court. The issue of abstention "per se" is not directly before the single judge, since his consideration is purely a jurisdictional and more limited one.

Three-Judge Courts: A Comprehensive Study, *supra*, at 503.

[12] The court is not persuaded by the rationale of *Cooper v. Meskill*, 376 F. Supp. 731 (D. Conn. 1974). In the present case, the court has considered only the jurisdictional criteria and finds that not all the requisites have been met. Accordingly, plaintiffs' motion to convene a statutory three-judge court is denied.

Upon the foregoing,

IT IS ORDERED That plaintiffs' motion to convene a three-judge court be, and the same hereby is denied.

IT IS FURTHER ORDERED That defendants' motion to stay or dismiss be, and the same hereby is denied.

DATED: December 22, 1975.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

**CLERK'S NOTICE OF JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA ***

(31 March 1982)

* The Court's Order for Judgment appears in its Memorandum Opinion and Order (31 March 1982), *ante*, pp. 3-27.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. Civil 4-74-659

LEON W. KNIGHT, ET AL, *Plaintiff*,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
ET AL, *Defendant*

**Clerk's Notice under Rule 77 (d) F. R. Civil Procedure
or Rule 49 (c) F. R. Criminal Procedure**

You are hereby notified that in the above-entitled cause, on the 31st day of March, 1982, we filed Judge Heaney's, Judge Alsop's and Judge Larson's Memorandum Opinion and Order that the constitutional infringements caused by the present meet and confer process in the community colleges clearly occur under color of state law. The Minnesota State Board for Community Colleges, in its official capacity, and the Minnesota Community College Faculty Association must equally share liability inasmuch as they together negotiated the aspects of the present structure which we have found violate plaintiffs' constitutional rights. There is no basis for individual liability or for finding any defendants liable other than the MSBCC and the MCCFA.

The parties have stipulated to nominal money damages of one dollar and we find that no other money damages are appropriate. The plaintiffs are entitled to declaratory and injunctive relief in accordance with this opinion. Therefore, PELRA as applied to the community colleges is declared valid in all respects, except

(1) Minn. Stat. § 179.73, subd. 2, is declared valid so long as all community college faculty members are provided a

fair opportunity both to select and serve as meet and confer representatives.

(2) Minn. Stat. § 179.66, subd. 7, is declared unconstitutional only insofar as it allows or requires an exclusive representative in the community colleges to have sole authority to select meet and confer representatives.

(3) The clause of the collective bargaining contract conferring sole selection authority upon the MCCFA is declared invalid, and the MCCFA is enjoined from making any further selections of meet and confer representatives pursuant to such clause.

The defendants shall bear their own costs in this proceeding and 20% of plaintiffs' costs shall be taxed to the MSBCC and the MCCFA, to be borne in equal shares.

Judgment was entered accordingly.

ROBERT E. HESS, Clerk

By: /s/ Merle M. Nelson
Deputy Clerk

**ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

(13 August 1982)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

File No. 4-74 Civ. 659

LEON W. KNIGHT, ET AL, *Plaintiffs,*

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
ET AL, *Defendants.*

ORDER

Before HEANEY, Circuit Judge, ALSOP, District Judge, and
LARSON, Senior District Judge.

This Court issued its Findings of Fact in the above-captioned matter on November 16, 1981 and its Memorandum Opinion on March 31, 1982. Plaintiffs have filed objections to the findings and conclusions therein and have moved, under Rules 52, 59 and 60, to amend such findings, for relief from judgment and for a new trial. Plaintiffs also have moved for a hearing on the calculation of attorneys' fees to which they may be entitled. Defendants have moved to amend the Court's judgment insofar as it taxes 20 per cent of plaintiffs' costs against the MCCFA and MSBCC. We deny all of these motions.

Defendants' motion to reduce the proportion of costs taxed against them is grounded on their contention that no more than 5-6 per cent of plaintiffs' efforts were expended on the "meet and confer" issue, the one issue on which plaintiffs prevailed. Plaintiffs have not disputed that the "meet and confer" issue was largely a discrete question of law and fact. Nor have they challenged defendants' assertions that the "meet and confer" issue was addressed in only 3 per cent of plaintiffs' exhibits, 6 per cent of the trial transcripts, .004 per cent of plaintiffs' proposed stipula-

tions and by none of plaintiffs' expert witnesses. Nonetheless, we recognize that there is some overlap between the First Amendment claim as to meet and confer practices and the other practices challenged by plaintiffs. The determination of costs is not a mechanical matter and courts are afforded broad discretion in making such determinations. *Environmental Defense Fund, Inc. v. Callaway*, 497 F.2d 1340, 1342 (8th Cir. 1974). The determination here that the MCCFA and MSBCC shall bear 20 per cent of plaintiffs' costs is a reasonable one and we, therefore, deny the motion to alter that aspect of the judgment.

[2] Plaintiffs' 380 pages of post-trial motions raise numerous detailed issues, nearly all of which were clearly resolved in the Findings of Fact, Memorandum Opinion or other prior rulings of this Court. One claim, for example, is that the findings are false, resting on fraud and "cover-ups" by the defendants. This was raised before the Special Master and was rejected previously by the Master and this Court. Nothing has been proffered which would give merit to the claim at this stage of the proceedings.

The central objection raised by plaintiffs relates to the conclusion that the defendant labor organizations do not constitute a single, integrated, political-action organization or quasi-political party. It is asserted that this conclusion rests on a misapplication of the burden of proof, misconstruction of the controlling law, misrepresentation of the record evidence, insufficiently detailed findings and a failure to accept the purportedly "conclusive" opinions of plaintiffs' expert witnesses. Most of these objections are simply an attempt to relitigate the case as a whole, but some clarification may facilitate appellate review of this Court's decision.

The Memorandum Opinion fully sets forth how *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) controls much of the present case. See Mem. Op. at 3-7. A major difficulty in this protracted litigation has been the

plaintiffs' consistent refusal to acknowledge *Abood* and its impact here. A crucial distinction in *Abood* is whether an exclusive representative's challenged "political" activities are related or unrelated to collective bargaining—only the latter cannot constitutionally be supported by compulsory fair share fees.¹ Here, however, plaintiffs have repeatedly ignored this distinction and in so doing, have obscured the factual issues and the evidence relating thereto. For example, the plaintiffs offered an expert "content analysis" of selected publications which purportedly showed that from 50-100 per cent of the defendants' activities were "political" and did not involve "collective bargaining." This analysis rested on sub- [3] jective judgments which in turn were predicated on the assumption that all "organizing, litigation and lobbying" activities were something separate from "collective bargaining." Apart from other flaws in the content analysis, the fundamental error is the refusal to acknowledge that, consistent with the Constitution, certain organizing and lobbying may be related to collective bargaining and may also, in some broad sense, be deemed "political." Accordingly, the content analysis could be afforded little weight in the face of overwhelming record evidence that the MCCFA is not a quasi-political party but rather is a typical public employee bargaining association.

Plaintiffs' refusal to recognize the effect of *Abood* has needlessly consumed extensive resources. *Abood* squarely

¹ This case is not a dispute over calculation of fair share fees, nor does it turn on line-drawing as to activities at the margin of what may be characterized as collective bargaining. When plaintiffs' assertions are viewed in their totality, it becomes clear that under their theory, any private bargaining organization will inevitably constitute an impermissible "political action" organization. Throughout this case, plaintiffs' characterization of MCCFA as a "political" organization has included as a predicate those government-related activities which are inherent in public sector bargaining.

upheld the constitutionality of exclusive representation bargaining in the public sector, yet plaintiffs have elaborately developed a theory under which such bargaining is unconstitutional unless the public employees' representative is actually some branch of the government. This theory is frivolous in light of *Abood*, but in any case, could have been fully presented in a cogent manner as a legal question turning on largely undisputed facts. Instead, the development of this theory was muddled with plaintiffs' theory that MCCFA, and probably any public sector union, is the constitutional equivalent of a political party, and was further blurred with repeated incantations that the arrangement under PELRA is the functional equivalent of Italian fascism and the National Industrial Recovery Act. Indeed, the presentation of plaintiffs' case has hindered rather than helped the Court to resolve the issues raised in their complaint.

We recognized, however, that important First Amendment interests were implicated and accordingly, placed the burden upon the defendants to establish that they were not quasi-political parties but instead were public employee bargaining organizations whose activities were predominantly related to collective bargaining. Consideration of this issue was unaided by plaintiffs' insistent and exhaustive attempts to construe as unconstitutional virtually all activity which in any sense may be labeled "political." This again reflects an unwillingness [4] to accept the holding of *Abood*.² Notwithstanding this, we closely examined

² The plaintiffs' post-trial motions in part reveal, for the first time, a nominal recognition that the issue is not whether the MCCFA is predominantly "political," however that may be defined, but whether its activities are predominantly related to collective bargaining, as illuminated in *Abood*. Belated recasting of part of its claim, however, does not change the record evidence nor the only conclusion which is supported by the record. Moreover, plaintiffs' adamant resistance to *Abood* is still reflected in the post-trial assertion that this Court erred by finding the MCCFA

the record as a whole and found that the defendants clearly met their burden. Plaintiffs' contrary assertions at this stage are simply another attempt to litigate matters on which they did not prevail for factual and legal reasons clearly set forth in the Findings of Fact and Memorandum Opinion.

The discussion here should remove any doubt as to the Court's resolution of issues which were also addressed by plaintiffs' expert witnesses. Plaintiffs insist that the opinions of organizational science experts, political science experts and political economy experts, when unrebutted by similar experts, must be accepted as binding upon the Court. We disagree. The questions addressed by such experts raise factual and legal issues well within the province of any court. The effect of PELRA on "political equality and state sovereignty," for example, is not a question for binding determination by mechanical rules of science, despite plaintiffs' suggestion to the contrary. Whether PELRA is the functional equivalent of any other piece of legislation is similarly a mixed question of law and fact not subject to supposedly dispositive "scientific" testimony. Nor is a "scientific" analogy to fascism binding upon a court. Plaintiffs also emphasize the expert opinion that the defendants constitute an "integrated" entity. The "integration" issue, however, is not a talisman, as plaintiffs would have us believe. The Findings of Fact clearly show certain affiliations between MCCFA and the other defend-

to be a "non-political" organization. Whatever the proper definition might be for the term "non-political," no one has contended, and we have never found, that the MCCFA is "non-political." Indeed, as the *Abood* Court noted, the core functions of any public sector union can be characterized as inherently political in some sense of that term. Plaintiffs' true objection is to the holding of *Abood* that exclusive representation bargaining in the public sector is constitutional notwithstanding the inherently political dimension of such activity. Much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding.

ants and also show that MCCFA independently charts the collective bargaining course it will pursue. Integration is only relevant as it [5] relates to plaintiffs' contention that the defendants are a monolithic "political action" organization, a claim clearly resolved in favor of the defendants. Here again, plaintiffs contend that the opinion of their political science expert is conclusive on the "political action" characterization, notwithstanding that the primary foundation for such testimony, like plaintiffs' case as a whole, utterly fails to account for permissible activity which may in some sense be "political" but which also relates to collective bargaining under the principles of *Aboud*.

These expert opinions thus are not binding upon the Court and indeed, in most part were not even helpful to resolution of the issues presented. Such opinions were given as much weight as appropriate and the weight of the record as a whole explains why they generally were not accepted.

The motions of plaintiffs and defendants are hereby denied. The request for a hearing on attorneys' fees is also denied as premature. Plaintiffs are directed to submit a written request for such fees and defendants are directed to file any objections they may have to such request within thirty days after it is served upon them. The Court will then consider whether a hearing or further submissions may be necessary to its disposition of any fee questions.

/s/ Gerald W. Heaney
GERALD W. HEANEY
United States Circuit Judge

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

/s/ Earl R. Larson
EARL R. LARSON
U. S. Senior District Judge

Dated: August 13, 1982.

**CLERK'S NOTICE OF ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA**

(13 August 1982)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civil 659

LEON W. KNIGHT, ET AL, *Plaintiff*,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
ET AL, *Defendant*

**Clerk's Notice under Rule 77(d) F. R. Civil Procedure
or Rule 49(c) F. R. Criminal Procedure**

You are hereby notified that in the above-entitled cause, on the 13th day of August, 1982 we filed Judge Heaney, Judge Alsop and Judge Larson's Order dated 8-12-82 that Plaintiffs' motion to amend findings, for relief from judgment, for a new trial and a hearing on the calculation of attorneys' fees and defendants' motion to amend Court's judgment insofar as it taxes 20 per cent of plaintiffs' costs against the MCCFA and MSBCC are all denied.

ROBERT E. HESS, CLERK

BY:
Deputy Clerk

NOTICE OF APPEAL

(4 October 1982)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON W. KNIGHT, MORGAN KJER, DONALD A. DAHLIN, JAMES D. WALLACE, TERRENCE D. FLORIN, WILLIAM B. BAUMAN, HAROLD J. GARDNER, THOMAS J. PATIN, EUGENE D. MIELKE, DR. RICHARD A. THOMPSON, DAVID R. GROUT, JOAN M. FARKAS, GARY LEE NELSON, RONALD LIEVENSE, LUCILLE JOHNSON, VIRGINIA E. LANEGAN, MAX A. MALMQUIST, RALPH G. POWELL, RICHARD D. ISENHART, CRESSTON GACKLE, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION; MINNESOTA EDUCATION ASSOCIATION; INDEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE FOR EDUCATION; NATIONAL EDUCATION ASSOCIATION; JAMES A. NORMAN, individually and in his former official capacity as President, Minnesota Community College Faculty Association; JAMES K. DURHAM, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; ROBERT BELL, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; CALVIN MINKE, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; RALPH S. CHESEBROUGH, individually and in his official capacity as Executive Secretary, Minnesota Community College Faculty Association; DONALD HOLMAN, individually and in his official capacity as Minnesota Education Association Representative, Minnesota Community College Faculty Association; WILLIAM M. MONDALE, individually and in his former official capacity as President, Minnesota Education Association; JAMES ROSASCO, individually and in his former official capacity as President, 1973-1974, Minnesota Education Association; ALFRED F. PROVO, individually

and in his former official capacity as Treasurer, Minnesota Education Association; ALBERT L. GALLOP, individually and in his official capacity as Executive Director, Minnesota Education Association; FULTON B. KLINKERFUES, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; JANET R. MORGAN, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; JOHN W. SCHUTT, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; JAMES A. HARRIS, individually and in his former official capacity as President, National Education Association; HELEN D. WISE, individually and in her former official capacity as President, 1973-1974, National Education Association; CATHERINE O'C. BARRETT, individually and in her former official capacity as President, 1972-1973, National Education Association; TERRY E. HERNDON, individually and in his official capacity as Executive Secretary, National Education Association; SAM E. LAMBERT, individually and in his former official capacity as Executive Secretary, 1972-1973, National Education Association; RAYMOND CRIPPEN, ROSEMARY MCVAY, JOHN SONTOROVICH, HUGH V. PLUNKETT III, ARLEENE NYCKLEMOE, DOUGLAS ALAN BRUCE, RONALD H. DENISON, EDWARD G. ZIEGLER, VAL BJORNSON, CHARLES SWANSON, individually; PHILLIP C. HELLAND, individually and in his official capacity as Chancellor of the Minnesota Community Colleges; JOHN F. HELLING, individually and in his official capacity as President, North Hennepin Community College; DALE A. LORENZ, individually and in his official capacity as President, Normandale Community College; NEIL CHRISTENSON, in his official capacity as President, Anoka-Ramsey Community College; WAYNE S. BURGGRAFF, in his official capacity as Minnesota Commissioner of Finance; JAMES LORD, in his official capacity as Minnesota State Treasurer; PETER OBERMEYER, in his official capacity as Director of the Minnesota

State Board of Mediation Services; WILLIAM H. McGUIRE, in his official capacity as President, National Education Association; ROGER JOHNSON, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; DONALD C. HILL, in his official capacity as President, Minnesota Education Association, TOYSE KYLE, ELMA PONTO, JOSEPH NORQUIST, NADINE CHASE, PAUL BRINKMAN, in their official capacities as members of the Minnesota State Board for Community Colleges,

Defendants.

**PLAINTIFFS' NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES**

Plaintiffs Leon W. Knight, *et alia*, hereby give notice that they appeal to the Supreme Court of the United States the judgment of this Court entered on 31 March 1982, and the findings of fact of this Court entered on 16 November 1981, both of which the Court re-affirmed in its order of 13 August 1982, denying Plaintiffs' motion for rehearing.

In particular, Plaintiffs appeal the Court's determination of law that the exclusive-representation provisions of Minnesota's Public Employment Labor Relations Act are constitutional as applied.¹ In addition, Plaintiffs appeal the Court's findings of fact to which Plaintiffs have previously objected.²

¹ Memorandum Opinion and Order (31 March 1982), Pt. I, §§ A and B, pp. 1-9; *id.*, Pt. III, § 1(a-c), pp. 18-19; *id.*, Order for Judgment, ¶¶ 1 ("There is no basis for individual liability or for finding any defendants liable other than the MSBCC and the MCCFA.") and 2 ("Therefore, PELRA as applied to the community colleges is declared valid in all respects * * *"), p. 20.

² Plaintiffs' Objections to the Court's Findings of Fact and Motion to Amend the Court's Findings of Fact to Conform to the Law and to the Evidence (1 April 1982), at 1-2 (identifying the findings at issue).

Plaintiffs appeal pursuant to 28 U.S.C. §§ 1253 and 2101(b) (1976).

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Filed with the Clerk of the United States District Court
for the District of Minnesota on 4 October 1982.

**TEXT OF CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

UNITED STATES CONSTITUTION

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

MINNESOTA PUBLIC EMPLOYMENT LABOR RELATIONS ACT

Sec. 179.61. Public policy.—It is the public policy of this state and the purpose of Secs. 179.61 to 179.77 to promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare.

The relationships between the public, the public employees, and their employer governing bodies imply degrees of responsibility to the people served, need of cooperation and employment protection which are different from employment in the private sector. So also the essentiality and public desire for some public services tend to create imbalances in relative bargaining power or the resolution with which either party to a disagreement presses its position, so that unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary.

Unresolved disputes between the public employer and its employees are injurious to the public as well as to the par-

ties; adequate means must therefore be established for minimizing them and providing for their resolution. Within the foregoing limitations and considerations the legislature has determined that overall policy may best be accomplished by:

(1) granting to public employees certain rights to organize and choose freely their representatives;

(2) requiring public employers to meet and negotiate with public employees in an appropriate bargaining unit and providing for written agreements evidencing the result of such bargaining; and

(3) establishing special rights, responsibilities, procedures and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer and the public at large.

Sec. 179.62. Citation.—Secs. 179.61 to 179.77 shall be known and may be cited as the public employment labor relations act of 1971.

Sec. 179.63. Definitions.—(1) For the purposes of Secs. 179.61 to 179.77 the terms defined in this section have the meanings given them.

(2). “Director of mediation services” or “director” means the director of the bureau of mediation services established by Sec. 179.02.

(3). “Board” means the Minnesota public employment relations board unless otherwise clearly stated.

(4). “Public employer” or “employer” means (a) the state of Minnesota in respect to employees of the state not otherwise provided for in this subdivision or Sec. 179.74 for executive branch employees; (b) the board of regents of the University of Minnesota in respect to employees thereof; and (c) the governing body of a political subdivision or agency or instrumentality thereof which has final

budgetary approval authority, in respect to employees of that subdivision, agency or instrumentality. When two or more units of government subject to the provisions of Sec. 179.61 to 179.77 undertake a project or form a new agency of government under Minnesota Statutes Ch. 402, or Sec. 471.59, or other law authorizing common or joint action, the employer for purposes of Secs. 179.61 to 179.77 shall be the governing person or board of the created agency and the governing official or body of the cooperating governmental units shall be bound by an agreement entered into by the created agency pursuant to the procedures of Minnesota Statutes, Secs. 179.61 to 179.77. The term does not include a "charitable hospital" as defined in Sec. 179.35(2). Nothing in this subdivision shall be construed to diminish the authority granted pursuant to law to an appointing authority in respect to the selection, direction, discipline or discharge of an individual employee insofar as such action is consistent with general procedures and standards relating to selection, direction, discipline or discharge which are the subject of an agreement entered into pursuant to Secs. 179.61 to 179.77. (As amended by Ch. 776, L. 1978)

(5). "Employee organization" means any union or organization of public employees whose purpose is, in whole or in part, to deal with public employers concerning grievances and terms and conditions of employment.

(6). "Exclusive representative" means an employee organization which has been designated by a majority of those votes cast in the appropriate unit and has been certified pursuant to Sec. 179.67. (As amended by Ch. 635, L. 1973)

(7). "Public employee" or "employee" means any person appointed or employed by a public employer except:

- (a) elected public officials;
- (b) election officers;

(c) commissioned or enlisted personnel of the Minnesota national guard;

(d) emergency employees who are employed for emergency work caused by natural disaster;

(e) part time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's bargaining unit; (As amended by Ch. 127, L. 1974)

(f) employees who hold positions of a basically temporary or seasonal character for a period not in excess of 100 working days in any calendar year;

The exclusions of clauses (e) and (f) of this subdivision shall not apply to:

(1) an employee hired by a school district to replace an absent teacher who at the time of his absence is a "public employee" not within the other exclusions of this subdivision where the replacement employee is employed more than 30 working days as a replacement for that teacher; and

(2) an employee hired by a school district for a teaching position created by increased enrollment, curriculum expansion, courses which are a part of the curriculum whether offered annually or not, or other appropriate reasons.

Employees included as "public employees" pursuant to clauses (1) and (2) shall not be included under master contracts expiring June 30, 1981, for purposes of salary or fringe benefits;

(g) employees of charitable hospitals as defined by section 179.35, subdivision 3;

(h) full time undergraduate students employed by the school which they attend under a work study program or in connection with the receipt of any financial aid, irrespective of number of hours of service per week. (Sec. 179.63(7), as amended by S.F. 2085, L. 1980, effective April 25, 1980)

(8). "Confidential employee" means any employee who works in the personnel offices of a public employer or who has access to information subject to use by the public employer in meeting and negotiating or who actively participates in the meeting and negotiating on behalf of the public employer. Provided that when the reference is to executive branch employees of the state of Minnesota or employees of the regents of the University of Minnesota, "confidential employee" means any employee who has access to information subject to use by the public employer in collective bargaining or who actively participates in collective bargaining on behalf of the public employer. (Sec. 179.63(8), as amended by S.F. 2085, L. 1980, effective April 25, 1980)

(9). "Supervisory employee," when the reference is to other than essential employees as defined in subdivision 11, means any person having authority in the interest of employer to hire, transfer, suspend, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances on behalf of the employer, or to effectively recommend any of the aforesaid actions, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but requires the use of independent judgment. Any determination of "supervisory employee" may be appealed to the public employment relations board. (As amended by Ch. 635, L. 1973).

(9a). "Supervisory employee," when the reference is to essential employees, means the administrative head and his assistant of a municipality, municipal utility, police or fire department or any person having authority in the interests of the employer to hire, transfer, suspend, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them or adjust their grievances on behalf of the employer, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but requires the use of independent judgment. Any determination of "supervisory employee" may

be appealed to the public employment relations board. (As added by Ch. 635, L. 1973)

(10). "Professional employee" means:

(a) any employee engaged in work (1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(c) a teacher shall be deemed to be a professional employee.

(11). "Essential employee" means firefighters, peace officers subject to licensure pursuant to Secs. 626.84 to 626.855, guards at correctional facilities, and employees of hospitals other than state hospitals; provided that (1) with respect to state employees, "essential employee" means all employees in the law enforcement, health care professional, correctional guards, and supervisory collective bargaining units, irrespective of severance, and not other employees, and (2) with respect to University of Minnesota employees, "essential employee" means all employees in the law en-

forcement, nursing professional and supervisory units, irrespective of severance, and no other employees. The term "firefighters" means salaried employees of a fire department whose duties include, directly or indirectly, controlling, extinguishing, preventing, detecting, or investigating fires. (Sec. 179.63(11), as amended by S.F. 2085, L. 1980, effective April 25, 1980)

(12). "Strike" means concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment for the purposes of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment.

(13). "Teacher" means any person other than a superintendent or assistant superintendent, employed by a school district in a position for which the person must be certificated by the state board of education or in a position as a physical therapist or an occupational therapist; and such employment does not come within the exceptions stated in subdivision 7, or defined in subdivisions 8, 9, or 14. (As amended by Ch. 789, L. 1978)

(14). "Principal" and "assistant principal" means any person so certificated by the state department of education who devotes more than 50 percent of his time to administrative or supervisory duties.

(15). "Meet and confer" means the exchange of views and concerns between employers and their respective employees.

(16). "Meet and negotiate" means the performance of the mutual obligations of public employers and the exclusive representatives of public employees to meet at reasonable times, including where possible meeting in advance of the budget making process, with the good faith intent of

entering into an agreement with respect to terms and conditions of employment; provided, that by such obligation neither party is compelled to agree to a proposal or required to make a concession.

(17). "Appropriate unit" or "unit" means a unit of employees, excluding supervisory employees, confidential employees and principals and assistant principals, as determined pursuant to Sec. 179:71(3), and in the case of school districts, the term means all the teachers in the district.

(18). The term "terms and conditions of employment" means the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean educational policies of a school district. The terms in both cases are subject to the provisions of Sec. 179.66 regarding the rights of public employers and the scope of negotiations. (As amended by Ch. 635, L. 1973)

(19). "Fair share fee challenge" means any proceeding or action instituted by a public employee, a group of public employees, or any other person, to determine their rights and obligations with respect to the circumstances or the amount of a fair share fee assessment authorized by Sec. 179.65(2). (As added by Ch. 102, L. 1976)

Sec. 179.64. Strikes; prohibitions; penalties.—Except as otherwise provided by subdivision 1a and Sec. 32, public employees, other than confidential, essential, managerial, and supervisory employees and other than principals and assistant principals, may strike only under the following circumstances:

(1)(a) The collective bargaining agreement between their exclusive representative and their employer has expired or, if there is no agreement, impasse under Sec. 32 [Sec. 179.-692] has occurred; and (b) the exclusive representative and

the employer have participated in mediation over a period of at least 45 days, provided that the mediation period established by Sec. 32 shall govern negotiations pursuant to that section. For the purposes of this subclause the mediation period commences on the day following receipt by the director of a request for mediation; and (c) written notification of intent to strike was served on the employer and the director by the exclusive representative on or after the expiration date of the collective bargaining agreement, or, if there is no agreement, on or after the date impasse under Sec. 32 [Sec. 179.692] has occurred and at least 10 days prior to the commencement of the strike, provided that if more than 30 days have expired after service of a notification of intent to strike, no strike may commence until 10 days after service of a new written notification; or

(2) The requirements of clause (1) have been satisfied and a request for binding arbitration has been rejected pursuant to Sec. 179.69; or

(3) The employer violates Sec. 179.68(2), clause (9); or

(4) In the case of state employees, (a) the legislative commission on employee relations has not given approval during a legislative interim to a negotiated agreement or arbitration award pursuant to Sec. 179.74(5), within 30 days after its receipt; or (b) the entire legislature rejects or fails to ratify a negotiated agreement or arbitration award, which has been approved during a legislative interim by the legislative commission on employee relations, at a special legislative session called to consider it, or at its next regular legislative session, whichever occurs first.

Written notification of intent to strike, under clauses (3) or (4), shall be served on the employer and the director by the exclusive representative at least 10 days prior to the commencement of the strike, provided that if more than 30 days have expired after service of a notification of intent to strike, no strike may commence until 10 days after service of a new written notification.

(1a) **Strikes authorized: teachers.**—Except as otherwise provided by Sec. 31, teachers employed by a local school district, other than principals and assistant principals, may strike only under the following circumstances:

(1)(a) The collective bargaining agreement between their exclusive representative and their employer has expired or, if there is no agreement, impasse under Sec. 31 has occurred; and

(b) The exclusive representative and the employer have participated in mediation over a period of at least 60 days, 30 days of which have occurred after the expiration date of the collective bargaining agreement, provided that the mediation period established by Sec. 31 [Sec. 179.691] shall govern negotiations pursuant to that section. For the purposes of this sub-clause, the mediation period commences on the day following receipt by the director of a request for mediation; and

(c) Written notification of intent to strike was served on the employer and the director by the exclusive representative on or after the expiration date of the collective bargaining agreement, or, if there is no agreement, on or after the date impasse under Sec. 31 [Sec. 179.691] has occurred and at least 10 days prior to the commencement of the strike, provided that if more than 30 days have expired after service of a notification of intent to strike, no strike may commence until 10 days after service of a new written notification; and (d) a request for binding arbitration has been rejected pursuant to Sec. 179.69; or

(2) 45 days after impasse pursuant to Sec. 30 neither party has requested arbitration; or

(3) The employer violates Sec. 179.68(2), clause (9).

Written notification of intent to strike under clauses (2) and (3) shall be served on the employer and the director by the exclusive representative at least 10 days prior to the commencement of the strike, provided that if more than 30

days have expired after service of a notification of intent to strike, no strike may commence until 10 days after service of a new written notification, and further provided that notice of intent to strike under clause (2) shall be given no earlier than the last day of the period provided in clause (2).

(1b)—Except as authorized in this section, all strikes by public employees shall be illegal. Except as provided in this section, no unfair labor practice or violation of Secs. 179.61 to 179.76 by a public employer shall give public employees a right to strike. Those factors may be considered, however, by the court in mitigation of or retraction of any penalties provided by this section.

During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if agreed, the terms of an existing contract shall continue in effect and shall be enforceable upon both parties.

(2). Notwithstanding any other provision of law, any public employee who strikes in violation of the provisions of this section may have his appointment or employment terminated by the employer effective the date the violation first occurs. The termination shall be made by serving written notice served upon the employee. Service may be made by certified mail.

(3). For purposes of the subdivision an employee who is absent from any portion of his work assignment without permission, or who abstains wholly or in part from the full performance of his duties without permission from his employer on the date or dates when a strike not authorized by this section occurs is *prima facie* presumed to have engaged in an illegal strike on the date or dates involved.

(4). A public employee who knowingly participates in a strike in violation of the provisions of this section and whose employment has been terminated pursuant to this

section, may subsequently be appointed or reappointed, employed or reemployed, but the employee shall be on probation for two years with respect to the civil service status, tenure of employment, or contract of employment to which he was previously entitled.

No employee shall be entitled to any daily pay, wages, reimbursement of expenses, or per diem for the days on which he engaged in a strike.

(5). Any public employee, upon request, shall be entitled, to request the opportunity to establish that he did not violate the provisions of this section. The request must be filed in writing with the officer or body having the power to remove the employee, within 10 days after notice of termination is served upon him. The employing officer, or body, shall within 10 days commence a proceeding at which the employee shall be entitled to be heard for the purpose of determining whether the provisions of this section have been violated by the public employee. If there are contractual grievance procedures, laws, or rules establishing proceedings to remove the public employee, the hearing shall be conducted in accordance with whichever procedure the employee elects provided that the election shall be binding and shall terminate any right to the alternative procedures. The same proceeding may include more than one employee's employment status if the employees' defenses are identical, analogous or reasonably similar. The proceedings shall be undertaken without unnecessary delay. Any person whose termination is sustained in the administrative or grievance proceeding may secure a review of his removal by serving a notice of appeal upon the employer removing him within 20 days after the results of the hearing have been announced. This notice, with proof of service thereof, shall be filed within 10 days after service, with the clerk of the district court in the county where the employer has its principal office or in the county where the employee last was employed by the employer. The district court shall have

jurisdiction to review the matter in the same manner as on appeal from administrative orders and decisions. This hearing shall take precedence over all matters before the court and may be held upon 10 days written notice by either party. The court shall make such order as it deems proper. An employer may obtain review of a decision to reinstate an employee in the same manner as provided for appeals by employees in this subdivision. An appeal may be taken from the district court order to the supreme court.

(6). An employee organization which has been found pursuant to Sec. 179.68 to have violated this section shall upon such finding lose its status, if any, as exclusive representative following such finding; and may not be so certified by the director for a period of two years following such finding; nor may any employer deduct employee payments to any such organization for a period of two years.

(7). Either a violation of Sec. 179.68(2), clause (9), or a refusal by the employer to request binding arbitration when requested by the exclusive representative pursuant to Sec. 179.69, (3) or (5) or, as applied to state employees, a disapproval by the legislative commission on employee relations pursuant to Sec. 2 [Ch. 332, L. 1979, establishing legislative commission on employee relations] or failure by the legislature to approve a negotiated agreement or arbitration award pursuant to Sec. 179.74, is a defense to violation of this section, except as to essential employees. As to all public employees, no other unfair labor practice or violation of Secs. 179.61 to 179.76 by a public employer shall be a violation of this section but may be considered by the court in mitigation of or retraction of any penalties as to employees and employee organizations. (Sec. 179.64 (1) to (7), as amended by S.F. 2085, L. 1980, effective July 1, 1980)

Sec. 179.65. Rights and obligations of employees.—Nothing contained in Secs. 179.61 to 179.77 shall be construed to limit, impair or affect the right of any public em-

ployee or his representative to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative if there be one; nor shall it be construed to require any public employee to perform labor or services against his will. If no exclusive representative has been certified, any public employee individually, or group of employees through their representative, shall have the right of expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, by meeting with their public employer or his representative so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment. (As amended by Ch. 635, L. 1973)

(2). Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. Except for employees included in Sec. 179.63,(10) clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The ex-

exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer of all employees within the unit. A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director pursuant to Sec. 3 [Sec. 179.71(2)] of this act. (As amended by Ch. 102, L. 1976)

(3). Public employees who are professional employees as defined by Sec. 179.63, subdivision (10), have the right to meet and confer with public employers regarding policies and matters not included under Sec. 179.63, subdivision (18), pursuant to Sec. 179.73. (As amended by Ch. 635, L. 1973)

(4). Public employees through their certified exclusive representative have the right and obligation to meet and negotiate in good faith with their employer regarding grievance procedures and the terms and conditions of employment, but such obligation does not compel the exclusive representative to agree to a proposal or require the making of a concession.

(5). Public employees shall have the right to request and be allowed dues check off for the exclusive representative. In the absence of an exclusive representative, public employees shall have the right to request and be allowed dues check off for the organization of their choice. (As amended by Ch. 635, L. 1973)

(6). Except for confidential employees excluded from bargaining pursuant to Sec. 179.74(4), and Sec. 40, supervisory and confidential employees, principals and assistant principals may form their own organizations. An employer shall extend exclusive recognition to a representative of or an organization of supervisory or confidential employees, or principals and assistant principals, for the purpose of negotiating terms or conditions of employment, in accordance with all other provisions of Secs. 179.61 to 179.76, as though they were essential employees. Supervisory or confidential employees shall not participate in any capacity in any negotiations which involve units of employees other than supervisory or confidential employees. A supervisory or confidential employee organization which is affiliated, either directly or indirectly, with another employee organization which is the exclusive representative of non-supervisory or nonconfidential employees of the same public employer or with a federation of other joint body of employee organizations, any one of whose affiliates is the exclusive representative of non-supervisory or nonconfidential employees of the same public employer, shall not be certified as, or act as, an exclusive representative pursuant to Secs. 179.61 to 179.76 or Sec. 41 [Sec. 179.742], except in the case of organizations of non-state, non-university of Minnesota essential supervisory employees as defined in Sec. 179.63(11). (As amended by S.F. 2085, L. 1980)

(7). An exclusive representative shall have the right to petition the director for arbitration under Sec. 179.69, subdivision 3; provided the exclusive representative or the employer has first petitioned the director for mediation services as are available under Sec. 179.69, subdivision 1. (As amended by Ch. 635, L. 1973)

Sec. 179.66. Rights and obligations of employers.—(1). A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the

functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

No public employer shall sign an agreement which limits the right of the public employer to select persons to serve as supervisory employees or state managers pursuant to Sec. 43.127 or requires the use of seniority in their selection. (As amended by Ch. 332, L. 1979)

(2). A public employer has an obligation to meet and negotiate in good faith with the exclusive representative of the public employees in an appropriate unit regarding grievance procedures and the terms and conditions of employment, but such obligation does not compel the public employer or its representative to agree to a proposal or require the making of a concession.

(3). A public employer has the obligation to meet and confer with professional employees to discuss policies and those matters relating to their employment not included under Sec. 179.73(18), pursuant to Sec. 179.73.

(4). A public employer has the obligation to meet and negotiate in good faith with the exclusive representative of the supervisory employees, confidential employees, principals and assistant principals, regarding grievance procedures and the terms and conditions of their employment, but such obligation does not compel the public employer or its representative to agree to a proposal or require the making of a concession. (As amended by Ch. 635, L. 1973)

(5). Any provision of any contract required by Sec. 179.70, which of itself or in its implementation would be in violation of or in conflict with any statute of the state of Minnesota or rule or regulation promulgated there-under or provision of a municipal home rule charter or ordinance or resolution adopted pursuant thereto, or rule of any state board or agency governing licensure or registration of an employee, provided such rule, regulation, home rule char-

ter, ordinance, or resolution is not in conflict with Secs. 179.61 to 179.67 and shall be returned to the arbitrator for an amendment to make the provision consistent with the statute, rule, regulation, charter, ordinance or resolution. (As amended by Ch. 635, L. 1973)

(6). Nothing in Secs. 179.61 to 179.77 shall be construed to impair, modify or otherwise alter, or indicate a policy contrary to the authority of the legislature of the state of Minnesota to establish by law schedules of rates of pay for its employees or the retirement or other fringe benefits related to the compensation of such employees.

(7). The employer shall not meet and negotiate or meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit or as provided for in Sec. 179.69, subdivision 1.

(8). An employer shall have the right to petition the director for arbitration under Sec. 179.69, subdivision 3; provided the exclusive representative or the employer has first petitioned the director for mediation services as are available under Sec. 179.69, subdivision 1.

(9). An employer may hire and pay for arbitrators desired or required by the provisions of Secs. 179.61 to 179.77.

(10). A public employer must afford reasonable time off to elected officers or appointed representatives of the exclusive representative and must, upon request, provide for leaves of absence to elected or appointed officials of the exclusive representative. (As added by Ch. 635, L. 1973)

Sec. 179.67. Exclusive representation; elections; decertification.—(1). Any employee organization holding formal recognition by order of the director or by employer voluntary recognition on the effective date of Extra Session Laws 1971, Ch. 33 under any law that is repealed by Extra Session Laws 1971, Ch. 33 is hereby certified as the exclu-

sive representative until such time as it is decertified or another representative is certified in its place pursuant to Extra Session Laws 1971, Ch. 33. Any teacher organization as defined by Sec. 125.20, subdivision 3 who on the effective date of Extra Session Laws 1971, Ch. 33 has a majority of its members on a teacher's council in a school district as provided in Sec. 125.22 is hereby certified as the exclusive representative of all teachers of that school district until such time as the organization is decertified or another organization is certified in its place pursuant to Secs. 179.61 to 179.77.

(2). An employee organization may be certified as the exclusive representative of public employees in an appropriate unit upon complying with and qualifying under the provisions of this section.

(3). The director may certify an employee organization as an exclusive representative in an appropriate unit upon the joint request of the employer and the organization if, after investigation, he finds that no unfair labor practice was committed in initiating and submitting the joint request and that the employee organization does in fact represent over 50 percent of the employees in the appropriate unit. The provisions of this subdivision shall not in any case reduce the time period or nullify any bar to the employee organization's certification existing at the time of the filing of the joint request.

(4). Any employee organization may obtain a certification election upon petition to the director wherein it is stated that at least 30 percent of the employees of a proposed employee unit wish to be represented by the petitioner. Any employee organization may obtain a representation election upon petition to the director wherein it is stated that the currently certified representative no longer represents the majority of employees in an established unit and that at least 30 percent of the employees in the established unit wished to be represented by the petitioner

rather than by the currently certified representative. An individual employee or group of employees in a unit may obtain a decertification election upon petition to the director wherein it is stated that the certified representative no longer represents the majority of the employees in an established unit and that at least 30 percent of the employees in the established unit wish to be represented by the petitioner rather than by the currently certified representative. An individual employee or group of employees in a unit may obtain a decertification election upon petition to the director wherein it is stated that the certified representative no longer represents the majority of the employees in an established unit and that at least 30 percent of the employees wish to be unrepresented. (As amended by S.F. 2085, L. 1980)

(4a). The director shall not consider a petition for a decertification election during the effective term of a contract covering employees of the executive branch of the state of Minnesota except for a period of not more than 270 to not less than 210 days before its date of termination. (As added by Ch. 332, L. 1979)

(5). The director shall, upon receipt of an employee organization's petition to the director wherein it is stated that at least 30 percent of the employees of a proposed employee unit wish to be represented by the petitioner or that the exclusive representative of a unit no longer represents the majority of the employees in the unit, investigate to determine if sufficient evidence of a question of representation exists and hold hearings as necessary to determine the appropriate unit and such other matters as may be necessary to determine the representation rights of the affected employees and employer.

(6). In determining the numerical status of an employee organization for purposes of subdivisions 2, 3, 4, and 8, the director shall require representation authorization signatures of affected employees as verification of the statements

contained in the joint request or petitions. Such authorization signatures shall be privileged and confidential information available to the director only and shall be dated.

(7). An employee organization shall be certified as the exclusive representative of an appropriate unit upon receiving a majority of those votes cast in the appropriate unit at a certification election. (As amended by Ch. 635, L. 1973)

(8). The director shall issue his order providing for a secret ballot election by the employees in a designated appropriate unit. The election shall be held in the premises where those voting are employed unless the director shall determine that the election cannot be fairly held, in which case it shall be held at such a place as the director shall determine.

(9). The ballot in a certification election may contain as many names of representative candidates as have demonstrated that the candidate has 30 percent of the employees in the unit desiring it as their exclusive representative. The ballots shall, in every case, contain an appropriate space for employees to indicate that no representation is desired.

(10). The director shall provide for and count absentee ballots in all elections.

(11). If no choice on the ballot receives a majority of those votes cast in the unit, the director shall conduct a run off election wherein the ballot shall contain only the two choices receiving the greater number of votes. (As amended by Ch. 635, L. 1973)

(12). Upon a representative candidate receiving a majority of those votes cast in a unit, the director shall certify that representative candidate as the exclusive representative of all employees in the unit. (As amended by Ch. 635, L. 1973)

(13). Upon a finding by the director of an unfair labor practice being committed by an employer or representative candidate or an employee or group of employees, which unfair labor practice affected the result of an election held pursuant to this section, the director may void such election result and order a new election.

(14). Upon the director certifying an exclusive representative, he shall not consider the question again for a period of one year, unless the exclusive representative is decertified by a court of competent jurisdiction, or by the director as authorized by Sec. 179.71.

Sec. 179.68. Unfair practices.—(1). The practices specified in this section are unfair practices. Any employee, employer, employee or employer organization, exclusive representative, or any other person or organization aggrieved by an unfair labor practice as defined in Secs. 179.61 to 179.77 may bring an action in district court of the county wherein the practice is alleged to have occurred for injunctive relief and for damages caused by such unfair labor practice.

(2). Public employers, their agents or representatives are prohibited from:

1) interfering, restraining or coercing employees in the exercise of the rights guaranteed in Secs. 179.61 to 179.77;

2) dominating or interfering with the formation existence or administration of any employee organization or contributing other support to it;

3) discriminating in regard to hire or tenure to encourage or discourage membership in an employee organization;

4) discharging or otherwise discriminating against an employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under Secs. 179.61 to 179.77;

5) refusing to meet and negotiate in good faith with the exclusive representative of its employees in an appropriate unit;

6) refusing to comply with grievance procedures contained in an agreement as required by Sec. 179.70;

7) distributing or circulating any blacklist of individuals exercising any legal right or of members of a labor organization for the purpose of preventing individuals so blacklisted from obtaining or retaining employment;

8) violating any of the rules and regulations established by the director regulating the conduct of representation elections or

9) refusing to comply with the provisions of a valid decision of a binding arbitration panel or arbitrator acting pursuant to Secs. 179.61 to 179.77;

(10) violating or refusing to comply with any lawful order or decision issued by the director or the board;

11) refusing to provide upon the request of the exclusive representative all information pertaining to the public employer's budget both present and proposed, revenues and other financing information. In the executive branch of the state government, the provisions of this clause shall not be considered contrary to the budgetary requirements set forth in Secs. 16.14, 16.15 and 16.155.

(3). Employee organizations, their agents or representatives, and public employees are prohibited from:

1) restraining or coercing employees in the exercise of their rights as provided in Secs. 179.61 to 179.77;

2) restraining or coercing a public employer in the election of his representatives to be employed for the purposes of meeting and negotiating or the adjustment of grievances;

3) refusing to meet and negotiate in good faith with a public employer, if they have been designated in accord-

ance with the provisions of Secs. 179.61 to 179.77 as the exclusive representative of employees in an appropriate unit;

4) violating any of the rules and regulations established by the director regulating the conduct of representation elections;

5) refusing to comply with the provisions of a valid decision of an arbitration panel or arbitrator acting pursuant to Secs. 179.61 to 179.77;

6) calling, instituting, maintaining or conducting a strike or boycott against any public employer on account of any jurisdictional controversy;

7) coercing or restraining any person with the effect to:

(a) force or require any public employer to cease dealing or doing business with any other person or;

(b) force or require a public employer to recognize for representation purposes an employee organization not certified by the director;

(c) refuse to handle goods or perform services;

(d) preventing an employee from providing services to the employer;

8) committing any act designed to damage or actually damaging physical property or endangering the safety of persons while engaging in a strike;

9) forcing or requiring any employer to assign particular work to employees in a particular employee organization or in a particular trade, craft, or class rather than to employees in another employee organization or in another trade, craft or class;

10) causing or attempting to cause a public employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed;

11) engaging in an unlawful strike;

12) picketing which has an unlawful purpose such as secondary boycott;

13) picketing which unreasonably interferes with the ingress and egress to facilities of the public employer;

14) seizing or occupying or destroying property of the employer;

15) violating or refusing to comply with any lawful order or decision issued by the director of the board as authorized by Secs. 179.61 to 179.77. (Sec. 179.68(1) to (3), as amended by Ch. 635, L. 1973)

Sec. 179.69. Procedures.—(1). When any employees or representative of employees shall desire to meet and negotiate an agreement establishing terms and conditions of employment, they shall give written notice to the employer and the director, and it shall thereupon be the duty of the employer to recognize the employee representative for purposes of reaching agreement on terms and conditions of employment of the employees or the employer shall within 10 days of receipt of the written notice object or refuse to recognize the employees' representative or the employees as an appropriate unit. The employer or employees' representative may thereupon petition the director to take jurisdiction of the matter whereupon the director shall then be authorized and shall perform those duties as provided in Sec. 179.71(2)(a) and (b).

Upon the certified exclusive representative and the employer reaching agreement on terms and conditions of employment or receiving a valid arbitration award, they shall execute a written contract or memorandum of contract containing the terms of negotiated agreement or arbitration award. The contracts or memoranda shall in every instance be subject to the provisions of Sec. 179.70. (As amended by S.F. 2085, L. 1980)

A petition by an employer shall be signed by him or his duly authorized officer or agent; and a petition by an ex-

clusive representative shall be signed by its authorized officer. In either case the petition shall be served by delivering it to the director in person or by sending it by certified mail addressed to him at his office. The petition shall state briefly the nature of the disagreement of the parties. Upon receipt of a petition, the director shall fix a time and place for a conference with the parties to negotiate the issues not agreed upon in the matter, and he shall then take whatever steps he deems most expedient to bring about a settlement of the matter, including assisting in negotiating and drafting an agreement. It shall be the duty of all parties to respond to the summons of the director for joint or several conference with him and to continue in such conference until excused by the director. However, for other than essential employees, mediation conferences following the expiration date of a collective bargaining agreement, or in the case of teachers following mediation over a period of 60 days after the expiration date of a collective bargaining agreement, shall continue only for durations agreeable to both parties.

(2). All negotiations, mediation sessions, and hearings between public employers and public employees or their respective representatives shall be public meetings except when otherwise provided by the director.

(3) For all public employees except those specified in subdivision 3a, the director shall certify a matter to the board for binding arbitration pursuant to Sec. 179.72 if:

(a) the director has determined that further mediation efforts under subdivision 1 would serve no purpose and has certified an impasse, or impasse has occurred by reason of the fact that the exclusive representative and the employer have participated in mediation for the period required in Sec. 22 [Sec. 179.64] and the collective bargaining agreement has expired, and,

(b) within 15 days of a request by one party for binding arbitration the other party has accepted the request. A re-

quest for arbitration is deemed rejected if the other party has not responded within 15 days of the request.

(3a) For all public employees defined as essential pursuant to Sec. 179.73(11), or treated as though they were essential pursuant to Sec. 179.65(6), the director shall only certify a matter to the board for binding arbitration pursuant to Sec. 179.72 when either or both parties petition for binding arbitration stating that an impasse has been reached and the director has determined that further mediation efforts under subdivision 1 would have no purpose.

(3b) When the director has certified a matter to the board for binding arbitration pursuant to subdivision 3 or 3a, within 15 days the parties shall each submit their respective final positions on matters not agreed upon. The director shall determine the matters not agreed upon based on the positions submitted by the parties and his efforts to mediate the dispute. Under a petition by either party the parties may stipulate those agreed upon items to be excluded from arbitration. (Sec. 179.69(1) to (3), as amended by S.F. 2085, L. 1980)

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Sec. 179.70. Contracts; grievances; arbitration.—(1). A written contract or memorandum of contract containing the agreed upon terms and conditions of employment and such other matters as may be agreed upon by the employer and exclusive representative shall be executed by the parties. The duration of the contract shall be negotiable except in no event shall contracts be for a term exceeding three years. Any contract between employer school board and an exclusive representative of teachers shall in every instance be for a term of two years beginning on July 1 of each odd-numbered year. For contracts effective July 1, 1979, or thereafter, the written contract executed by an employer school board and an exclusive representative of teachers shall contain the teachers' compensation including fringe benefits for the entire two year term and shall

not contain a wage reopening clause or any other provision for the renegotiation of the teachers' compensation for the second year of the contract. All contracts shall include a grievance procedure which shall provide compulsory binding arbitration of grievances including all disciplinary actions. In the event that the parties cannot reach agreement on the grievance procedure, they shall be subject to the grievance procedure promulgated by the director pursuant to Sec. 179.71(5)(i). Employees covered by civil service systems created pursuant to Minnesota Statutes, Chs. 43, 44, 375, 387, 419, or 420, or by provision of a home rule charter pursuant to Ch. 410, or by Ch. 423, L. 1941, may pursue a redress of their grievances through the grievance procedure established pursuant to this section. When the resolution of a grievance is also within the jurisdiction of appeals boards or appeals procedures created by the Minnesota Statutes, Chs. 43, 44, 375, 387, 419, or 420, or by provision of a home rule charter pursuant to Ch. 410, or Ch. 423, L. 1941, the grieving employee shall have the option of pursuing redress through the grievance procedure or the civil service appeals procedure, but once a written grievance or appeal has been properly filed or submitted by the employee or on the employee's behalf with his consent the employee's right to pursue redress in the alternative manner is terminated. This section does not require employers or employee organizations to negotiate on matters other than terms and conditions of employment as defined in Sec. 179.63(18). (As amended by Ch. 183, L. 1979)

(2) The employer shall implement the terms of the contract in the form of an ordinance or resolution. If the implementation of the terms of the contract require the adoption of a law, ordinance, or charter amendment, the employer shall make every reasonable effort to propose and secure the enactment of such law, ordinance, resolution, or charter amendment.

(3). In the event the employer and exclusive representative are bound by the terms of any arbitration decision of

the arbitration panel or other terms established by operation of law, they shall execute a written contract or memorandum of contract containing the terms of such arbitration decision or such terms as are established by law. Upon execution of such contract, the employer shall implement its terms as required by subdivision 2 of this section.

(4). If the parties to a contract cannot agree upon an arbitrator or arbitrators as provided by the contract grievance procedures or the procedures established by the director, the parties shall, under direction of the chairman of the board, alternately strike names from a list of five arbitrators selected by the board until only one name remains which arbitrator shall make his decision regarding the grievance and it shall be binding upon the parties. The parties shall share equally the costs and fees of the arbitrator.

(5). All arbitration decisions authorized or required by a grievance procedure shall be subject to these limitations of arbitration decisions contained in Sec. 179.72, subdivision 7. Further, upon rendering any arbitration decision authorized or required by a grievance procedure the arbitrator shall transmit both to the board and to the director a copy of his decision and any written explanation thereof. Should any issues submitted to arbitration be settled voluntarily before the arbitrator issues his decision, notice of such settlement shall be made by the arbitrator in a report issued both to the board and to the director. (As amended by Ch. 247, L. 1974)

(6). For purposes of this section, "grievance" means a dispute or disagreement as to the interpretation or application of any term or terms of any contract required by this section.

Sec. 179.71. Director's power, authority and duties.—

(1). The director of mediation services is authorized to and shall perform those duties provided in this section.

(2). The director shall accept and investigate all petitions for:

(a) certification or decertification as the exclusive representative of an appropriate unit;

(b) mediation services;

(c) any election or other voting procedure provided for in Secs. 179.61 to 179.77;

(d) certification to the board of arbitration;

(e) to hear and decide all issues in a fair share fee challenge. (Sec. 179.71(2), as amended by Ch. 102, L. 1976)

(3). The director shall determine appropriate units, except where appropriate units are defined by Sec. 40 [Sec. 179.741]. In determining the appropriate unit he shall take into consideration, along with other relevant factors, the principles and the coverage of uniform comprehensive position classification and compensation plans of the employees, involvement of professions and skilled crafts and other occupational classifications, relevant administrative and supervisory levels of authority, geographical location, and the recommendation of the parties, and shall place particular importance upon the history and extent of organization and the desires of the petitioning employee representatives.

In addition, with regard to the inclusion or exclusion of supervisory employees, the director must find that an employee may perform or effectively recommend a majority of those functions referred to in Sec. 179.63, subdivisions 9 or 9a, before an employee may be excluded as supervisory. However, in every case the administrative head, and his assistant, of a municipality, municipal utility, police or fire department shall be considered a supervisory employee.

He shall not designate an appropriate unit which includes employees subject to Sec. 179.63, subdivision 11, with employees not included in Sec. 179.63, subdivision 11. (Sec. 179.71(3), as amended by S.F. 2085, L. 1980)

(4). Public employers and exclusive representatives of employees may voluntarily participate in joint negotiations in similar or identical appropriate units. It is the policy of Secs. 179.61 to 179.77 to encourage such areawide negotiations and the director shall encourage it whenever possible.

(5). In addition to all other duties imposed by Sec. 179.77:

(a) provide mediation services as requested by the parties for purposes of this subdivision until the parties reach agreement; provided, however, he may continue to assist parties after the parties have submitted their final positions as provided or required under Sec. 179.72, subdivision 6; or Sec. 179.69;

(b) issue notices, subpoenas and orders as may be required by law to carry out his duties under Secs. 179.61 to 179.77. Issuance of orders shall include those orders of the Minnesota public employment relations board;

(c) certify to the Minnesota public employment relations board those items of dispute between parties to be subject to the action of the Minnesota public employment relations board under Sec. 179.69; subdivision 3;

(d) assist the parties in formulating petitions, notices, and other papers required to be filed with the director or the board;

(e) certify the final results of any election or other voting procedure conducted pursuant to Secs. 179.61 to 179.77;

(f) adopt reasonable and proper rules relative to and regulating the forms of petitions, notices, orders and the conduct of hearings and elections subject to final approval of the Minnesota public employment relations board. The rules shall be printed and made available to the public and a copy delivered with each notice of hearing; provided, that any rule shall be filed with the secretary of state, and any change therein or additions thereto shall not take effect until 20 days after such filing;

(g) receive, catalogue and file in a logical manner all orders and decisions of the Minnesota public employment relations board and all arbitration panels authorized by Secs. 179.61 to 179.77 as well as all grievance arbitration decisions and the director's own orders and decisions. All orders and decisions catalogued and filed shall be made readily available to the public;

(h) promulgate a grievance procedure to effectuate the purposes of Sec. 179.70, subdivision 1. The grievance procedure shall not provide for the services of the bureau of mediation services. The exercise of authority granted by this clause shall be subject to the provisions of Ch. 15. The grievance procedure shall be available to any public employee employed in a unit not covered by a contractual grievance procedure as contained in Sec. 179.70, subdivision 1;

(i) conduct elections.

(j) assign state employee classifications and University of Minnesota employee classifications to the appropriate units provided in Sec. 40 [Sec. 179.741], when the classifications have not been assigned pursuant to Sec. 40 [Sec. 179.741], or have been significantly modified in occupational content subsequent to assignment pursuant to Sec. 40 [Sec. 179.741], and assign supervisory employees to the appropriate units provided in Sec. 40 [Sec. 179.741], when the positions have not been assigned pursuant to Sec. 40 [Sec. 179.741] or have been significantly modified in occupational content. The assignment of the classes shall be made on the basis of the community of interest of the majority of employees in these classes with the employees within the statutory units, and all the employees in the class, excluding supervisory and confidential employees, shall be assigned to a single appropriate unit. (Sec. 179.71(5)(a) to (j), as amended by S.F. 2085, L. 1980)

(6). The director may at the request of a certified exclusive representative or employer who is a party to a labor dispute render assistance in settling the dispute without

the necessity of filing the petition referred to in Sec. 179.69, subdivision 1. If the director takes mediation jurisdiction of the dispute as a result of such a request, he shall then proceed as provided in Sec. 179.69.

(7). The director shall not furnish mediation services to any employees nor any employee representative who is not at the time certified as an exclusive representative.

(8). Hearings and mediation meetings authorized by this section shall be held in the county which best meets the conveniences of the witnesses, but such hearings may be held at a time and place as is agreed to by the petitioner and those parties affected by the petition.

Sec. 179.72. Public employment relations board; powers and duties; arbitration.—(1). There is hereby established a public employment relations board with the powers and duties assigned to it by this section. The board shall consist of five members appointed by the governor of the state of Minnesota. Two members shall be representative of public employees; two shall be representative of public employers; and one shall be representative of the public at large. Public employers and employee organizations representing public employees may submit for consideration names of persons representing their interests to serve as members of the board. Members shall be appointed for a term of four years, except that of the members first appointed two shall be appointed for a term ending the first Monday in April, 1974, and three for a term to expire on the first Monday in April, 1976. Members shall hold office until their successors are appointed and qualified and vacancies shall be filed by the governor of the state of Minnesota for the unexpired term. The board shall select one of its members to serve as chairman for a term beginning May 1 each year. The director of mediation services shall provide secretarial and administrative services to the board. (As amended by Ch. 635, L. 1973)

(2). The board shall adopt its own rules governing its procedure and shall hold regular and special meetings as

are prescribed in such rules. The chairman shall preside at meetings of the board. Members of the board shall be reimbursed at the rate of \$35 per day when in attendance at meetings of the board and shall be allowed their actual and necessary travel or other expenses incurred in the performance of their duties pursuant to the laws and rules governing such expenses for state employees.

(3). In addition to the other powers and duties given it by law, the board has the following powers and duties;

(a) to hear and decide issues relating to the meaning of the terms "supervisory employee", "confidential employee", "essential employee" or "professional employee", as defined by Sec. 179.63;

(b) to hear and decide appeals from determinations of the director relating to the appropriateness of a unit under Sec. 179.67;

(c) to approve or disapprove the rules and regulations promulgated by the director under Sec. 179.71, subdivision 5 (g);

(d) to hear and decide on the record from determinations of the director relating to a fair share fee challenge decided under Sec. 3 [Sec. 179.71(2)] of this act. (As added by Ch. 102, L. 1976)

(4). The board shall adopt rules pursuant to Ch. 15 governing the presentation of issues relating to matters included in subdivision 3; and the taking of such appeals. All issues and appeals presented to the board shall be determined upon the record established by the director of mediation, except that the board at its discretion may request additional evidence when necessary or helpful. (As amended by Ch. 246, L. 1974)

(5) The board shall maintain a list of names of arbitrators qualified by experience and training in the field of labor management negotiations and arbitration. Names on

the list may be selected and removed at any time by a majority of the board. In maintaining the list of such persons the board shall, to the maximum extent possible, select persons from varying geographical areas of the state.

(6). When final positions are certified to the board as provided in Sec. 179.69, the board shall constitute an arbitration panel as follows:

The parties shall, under the direction of the chairman of the board, alternately strike names from a list of seven arbitrators until only three names remain, which three members shall be members of the panel; provided, however, that if either party requests the parties shall select a single arbitrator to hear the dispute. If the parties are unable to agree on who shall strike the first name, the question shall be decided by the flip of a coin. In submitting names of arbitrators to the parties the board shall endeavor whenever possible to include names of persons from the general geographical area in which the public employer is located. The panel shall assume and have jurisdiction over the items of dispute certified to the board for which the panel was constituted. The panel's orders shall be issued upon a majority vote of members considering a given dispute. The members of the panel shall be paid their actual and necessary traveling and other expenses incurred in the performance of their duties plus a per diem allowance of \$180 for each day or part thereof while engaged in the consideration of a dispute. All fees, expenses and costs of the panel shall be shared and assessed equally to the parties to the dispute. In those cases where a single arbitrator is hearing a dispute, the fees, expenses and costs of the arbitrator shall also be shared and assessed equally by the parties to the dispute. (As amended by S.F. 2085, L. 1980)

(7). The arbitration panel or arbitrator selected by the parties shall resolve the issues in dispute between the parties as submitted by the board, and the panel's decision and order shall be final and binding upon the parties. Pro-

vided, however, that no decision of the panel which violates any provision of the laws of Minnesota or rules or regulations promulgated thereunder or municipal charters or ordinances or resolutions enacted pursuant thereto, or which causes a penalty to be incurred thereunder, shall have any force or effect. In considering a dispute and issuing its order the panel shall give due consideration to the statutory rights and obligations of public employers to efficiently manage and conduct its operations within the legal limitations surrounding the financing of such operations. The panel's orders shall be issued by a majority vote of its members considering a given dispute. The panel shall have no jurisdiction over nor authority to entertain any matter or issue not within the definition stated in Sec. 179.63, subdivision (18); provided, however, items not within terms and conditions of employment may be included in an arbitration decision if such items are contained in the employer's final position. Any issue or order or part thereof issued by the panel determining any matter not included under Sec. 179.63, subdivision (18) or the employer's final position shall be void and of no effect. The panel shall render its decision within 10 days from the date that all arbitration proceedings have been concluded, but in any event must issue its order by the last date the employer is required by statute, charter, ordinance or resolution to submit its tax levy or budget or certify its taxes voted to the appropriate public officer, agency, public body or office, or by November 1, whichever date is earlier. The panel's order shall be for such period as the panel shall direct, except that orders determining contracts for teacher units shall be effective to the end of the contract period as determined by Sec. 179.70, subdivision 1. (As amended by Ch. 635, L. 1973)

(7a) Notwithstanding the provisions of subsection (7), for employees of the executive branch of the state of Minnesota, the panel shall be restricted to selecting between the final offers on each impasse item submitted by the parties to the panel.

(7b) Notwithstanding the provisions of subsection (7), for essential employees, supervisory employees, confidential employees, and principals and assistant principals who are not employees of the executive branch of the state of Minnesota, the panel shall be restricted to selecting between the final offers on each impasse item submitted by the parties to the panel. (Sec. 179.72 (7a) and (7b), as added by Ch. 332, L. 1979)

(8). The arbitration panel may issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence which relates to any matter involved in any dispute before it. The panel may administer oaths and affidavits, and may examine witnesses. Attendance of witnesses and the production of evidence may be required from any place in the state at any designated place of hearing; provided, however, the panel's meeting shall be held in the county in which the principal administrative offices of the employer are located, unless another location is selected by agreement of the parties. In case of contumacy or refusal to obey a subpoena issued under this section, the district court of the state for the county where the proceeding is pending or in which the person guilty of such contumacy or refusal to obey is found, or resides, or transacts business shall on application of the panel have jurisdiction to issue to such person an order requiring such person to appear before the panel, there to produce evidence as so ordered, or there to give testimony touching the matters in issue, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

(9). Upon issuing its decision and order involving any dispute, the panel shall transmit the order and any written decision explaining the order to the board and to the director and to the appropriate representative or officer of the public employer and the employees. Should any issues submitted to arbitration shall be settled voluntarily before the arbitrator issues his decision, notice of such settlement

shall be made by the arbitrator in a report issued both to the board and to the director. (As amended by Ch. 247, L. 1974)

(10). At the request of the exclusive representative to a dispute involving any essential employees, the board shall proceed in accordance with Sec. 179.72 and the order shall be binding on both parties. The parties may stipulate those agreed upon items to be excluded from arbitration. (As amended by Ch. 635, L. 1973)

(11). The parties to an arbitration proceeding may at any time prior to or after issuance of an order of the arbitration panel, agree and settle upon terms and conditions of employment regardless of the terms and conditions of employment determined by the order. The parties shall, if so agreeing and settling, execute a written contract or memorandum of contract pursuant to Sec. 179.70, subdivision (1).

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Sec. 179.74. State and its employees; negotiating team; appropriate units.—(1). For purposes of this section the term “appointing authority” has the meaning given it by Sec. 43.01, subdivision (11).

(2). The employer of state employees shall be, for purposes of Secs. 179.61 to 179.76, the commissioner of employee relations or his representative.

(3). In all negotiations between the state and exclusive representatives the state shall be represented by a negotiating team consisting of the commissioner of employee relations, or his representative. The attorney general, and each appointing authority shall cooperate with the commissioner of employee relations in conducting negotiations and shall make available any personnel and other resources as are necessary to enable the team to conduct effective negotiations.

(4). The commissioner of employee relations shall meet and negotiate with the exclusive representative of each of

the units specified in Sec. 40, subdivision 1 [Sec. 179.741 (1)], in the manner prescribed by Secs. 179.61 to 179.76. The appropriate units provided for in Sec. 40 [Sec. 179.741] shall be the only appropriate units for executive branch state employees. The positions and classes of positions in the classified and unclassified services defined as managerial by the commissioner of employee relations in accordance with the provisions of Sec. 43.376 and so designated in the official state compensation schedules, all unclassified positions in the state university system and the community college system defined as managerial by their respective boards, all positions of physician employees compensated pursuant to Sec. 43.126, the positions of all unclassified employees appointed by the governor, lieutenant governor, secretary of state, attorney general, treasurer and auditor, all positions in the bureau of mediation services and the public employment relations board, all hearing examiner positions in the office of hearing examiners, and the positions of all confidential employees shall be excluded from any appropriate unit. The governor may upon the unanimous written request of exclusive representatives of units and the commissioner direct that negotiations be conducted for one or more units in a common proceeding or that supplemental negotiations be conducted for portions of a unit or units defined on the basis of appointing authority or geography.

(5). The commissioner of employee relations is authorized to and may enter into agreements with exclusive representatives of the units specified in Sec. 40, subdivision 1 [Sec. 179.741(1)]. The provisions of the negotiated agreements and arbitration awards shall be submitted to the legislature to be accepted or rejected in accordance with this section and Sec. 3.855. In the event that a proposed agreement or arbitration award is rejected or is not approved by the legislature prior to its adjournment in an odd-numbered year, the legislative commission on employee relations is authorized to give interim approval to a pro-

posed agreement or arbitration award. The proposed agreement or arbitration award shall be implemented upon its approval by the commission and state employees covered by the proposed agreement or arbitration award shall not have the right to strike while the interim approval is in effect. The commission shall submit the agreement or arbitration award to the legislature for ratification at a special legislative session called to consider it or at its next regular legislative session. Wages and economic fringe benefit increases provided for in the agreement or arbitration award which were paid pursuant to the interim approval by the commission shall not be affected but such wages and benefit increases shall cease to be paid or provided effective upon the rejection of the agreement or arbitration award or upon adjournment by the legislature without acting upon the agreement or arbitration award. (Sec. 179.74(1) to (5), as amended by S.F. 2085, L. 1980, effective April 25, 1980)

Sec. 179.741. State and University of Minnesota employees; appropriate units.—(1). State employees. Subject to the provisions of Sec. 41, subdivision 5 [Sec. 179.742(5)], all appropriate units of state employees certified as of the effective date of this subdivision are abolished. The following shall be the appropriate units of executive branch state employees for the purposes of Secs. 179.61 to 179.76. All units shall exclude employees excluded by Sec. 38 [Sec. 179.74] and supervisory employees shall only be assigned to units 12 and 16. Unclassified employees, unless otherwise excluded, are included within the units which include the classifications to which they are assigned for purposes of compensation. No additional units of executive branch state employees shall be recognized for the purpose of meeting and negotiating.

1) Law enforcement unit. This unit shall consist of all sworn highway patrol personnel, all uniformed conservation officers, and all criminal apprehension agents.

2) Craft, maintenance, and labor unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

3) Service unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

4) Health care non-professional unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

5) Health care professional unit. This unit shall consist of all positions which are required to be filled by registered nurses.

6) Clerical and office unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

7) Technical unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

8) Correctional guards unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

9) State university instructional unit. This unit shall consist of those positions assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

10) Community college instructional unit. This unit shall consist of those positions assigned to this unit in the unit

composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

11) State university administrative unit. This unit shall consist of those positions assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

12) Professional engineering supervisory unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

13) Health treatment unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

14) General professional unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

15) Professional state residential instructional unit. This unit shall consist of those classifications assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

16) Supervisory employees unit. This unit shall consist of those positions assigned to this unit in the unit composition schedule adopted by the legislative commission on employee relations on March 24, 1980.

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Sec. 179.742. Transition to new bargaining unit structure for state and University of Minnesota employment.—(1). Application of section. Notwithstanding Sec. 179.65, subdivision 2, or any other law, this section shall govern, where contrary to other law, the initial certification and decertification, if any, of exclusive representatives for the appropriate units of state employees and University of Minnesota employees established by Sec. 40 [Sec. 179.741]. Subse-

quent to the initial certification and decertification, if any, pursuant to this section, the provisions of this section shall not apply.

(2). Existing majority. The director shall certify an employee organization as exclusive representative for an appropriate unit established by Sec. 40 [Sec. 179.741] upon a petition filed with the director by the organization within 30 days of the effective date of this section for state employees and within 180 days of the effective date of this section for University of Minnesota employees stating that the petitioner is certified pursuant to Sec. 179.67 as the exclusive representative of a majority of the employees included within the unit established by Sec. 40 [Sec. 179.741] on the effective date of this section. Two or more employee organizations which represent the employees in a unit established by Sec. 40 [Sec. 179.741] may petition jointly pursuant to this subdivision, provided that any organization may withdraw from a joint certification in favor of the remaining organization or organizations on 30 days notice to the remaining organization or organizations, the employer, and the director without effect upon the rights and obligations of the remaining organization or organizations or the employer. The director shall make a determination on a timely petition within 45 days of its receipt.

(3). No existing majority. 1) If no exclusive representative is certified under subdivision 2, the director shall certify an employee organization as exclusive representative for an appropriate unit established by Sec. 40 [Sec. 179.741] upon a petition filed by the organization within the time period provided in subdivision 2, stating that the petitioner is certified pursuant to Sec. 179.67 as the exclusive representative of fewer than a majority of the employees included within the unit established by Sec. 40 [Sec. 179.741], where no other employee organization so certified has filed a petition within the time period provided in subdivision 2 so long as a majority of the employees in the unit

established by Sec. 40 [Sec. 179.741] are represented by employee organizations pursuant to Sec. 179.67 on the effective date of this section. Two or more employee organizations, each of which represents employees included in the unit established by Sec. 40 [Sec. 179.741] may petition jointly pursuant to this clause, provided that any organization may withdraw from a joint certification in favor of the remaining organization or organizations on 30 days notice to the remaining organization or organizations, the employer, and the director without effect upon the rights and obligations of the remaining organization or organizations or the employer. The director shall make a determination on a timely petition within 45 days of its receipt.

2) If no exclusive representative is certified under subdivision 2 or subdivision 3, clause (1), and an employee organization petitions the director within 45 days of the effective date of this section for state employees and within 195 days of the effective date of this section for University of Minnesota employees stating that at least 30 percent of the employees included within a unit established by Sec. 40 [Sec. 179.741] wish to be represented by the petitioner, where this 30 percent is evidenced by current dues deduction rights, signed statements plainly indicating that the signatories wish to be represented for collective bargaining purposes by the petitioner rather than by any other organization, or a combination thereof, the director shall conduct a secret ballot election to determine the wishes of the majority. The election shall be conducted within 75 days of the effective date of this section for state employees and within 225 days of the effective date of this section for University of Minnesota and shall, where not inconsistent with other provisions of this section, be governed by Sec. 179.67.

(4). Decertification. Prior to January 1, 1981 the director shall consider a petition for decertification of an exclusive representative certified under this section only when the

petition is filed within 60 days of the initial certification and only when the certification was made pursuant to subdivisions 2 or 3(1). The petition shall be considered under the provisions of Sec. 179.67 except where they are inconsistent with this subdivision.

(5). Contract and representation responsibilities. Notwithstanding the provisions of Sec. 40 [Sec. 179.741], the exclusive representatives of units of state employees and University of Minnesota employees certified prior to the effective date of this section shall remain responsible for administration of their contracts and for all other contractual duties and shall enjoy the right to dues and fair share fee deduction and all other contractual privileges and rights until June 30, 1981. Exclusive representatives of state employees and University of Minnesota employees certified after the effective date of this section shall immediately upon certification have the responsibility of bargaining on behalf of employees within the unit. They shall also have the responsibility of administering grievances arising under previous contracts covering employees included within the unit which remain unresolved on June 30, 1981. Where the employer does not object, these responsibilities may be varied by agreement between the outgoing and incoming exclusive representatives. All other rights and duties of representation shall commence on July 1, 1981, except that exclusive representatives certified after the effective date of this section shall immediately upon certification have the right to all employer information and all forms of access to employees within the bargaining unit which would be permitted to the current contract-holder. This section shall in no way affect any existing collective bargaining contract. Should an exclusive bargaining agent not be certified for the unit provided for in Sec. 40, subdivision 3, clause (2) [Sec. 179.741(3)(2)], the employees assigned to that unit shall continue to be compensated pursuant to the appropriate University of Minnesota civil service rules, or by the terms of any master or uniform

contract of their particular trade which exists between associations of employers in their local area representing all or substantially all of the employees of that trade.

Nothing in Secs. 1 to 42 [S.F. 2085, L. 1980] shall prevent an exclusive representative certified after the effective date of Secs. 1 to 42 [S.F. 2085, L. 1980] from assessing fair share or dues deductions immediately upon certification for employees in a unit established under Sec. 40 [Sec. 179.741] if the employees were unrepresented for collective bargaining purposes prior to that certification. (Sec. 179.742(1) to (5), as added by S.F. 2085, L. 1980)

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Sec. 179.75. Penalties and enforcement.—(1) Minnesota Statutes 1971, Secs. 185.07 to 185.19, shall apply to all public employees, including those specifically excepted from the definition of public employee in Sec. 179.63, subdivision 7, except as Secs. 185.07 to 185.19 may be inconsistent with Sec. 179.68. (As amended by Ch. 635, L. 1973)

Sec. 179.76. Independent review.—It shall be the public policy of the state of Minnesota that every public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment. When such review is not provided under statutory, charter, or ordinance provisions for a civil service or merit system, the governmental agency may provide for such review consistent with the provisions of law or charter. If no other procedure exists for the independent review of such grievances, the employee may present his grievance to the public employment relations panel under procedures established by the board.

**PLAINTIFFS' OBJECTIONS TO THE COURT'S
FINDINGS OF FACT *and* MOTION TO AMEND
THE COURT'S FINDINGS OF FACT TO
CONFORM TO THE LAW AND TO THE EVIDENCE**

(1 April 1982)

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, ET AL., *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
ET AL., *Defendants*.

**PLAINTIFFS' OBJECTIONS TO THE COURT'S
FINDINGS OF FACT**

and

**MOTION TO AMEND THE COURT'S FINDINGS OF FACT
TO CONFORM TO THE LAW AND TO THE EVIDENCE**

Pursuant to Federal Rule of Civil Procedure 52, Plaintiffs Leon W. Knight, *et alia*, hereby respectfully object to certain of the Court's Findings of Fact (CFF)¹ and move the Court to amend those purported findings, as set forth herein, to conform to the law and to the evidence adduced in the parties' stipulations and in the hearings before the Special Master.

Specifically, Plaintiffs request that the Court:

1. Strike as unlawful and clearly erroneous the purported findings in CFF §§ I.4; II.; IV.A.1. through IV.A.3., inclusive; and IV.B.4.
2. Replace the purported findings stricken in CFF § II. with findings consistent with the law and the evi-

¹ Entered 16 November 1981.

dence as presented in Plaintiffs' Proposed Findings of Fact (PFF) Nos. 25-172, inclusive.²

3. Replace the purported findings stricken [2] in CFF § IV.A.1. through IV.A.3., inclusive, with findings consistent with the law and the evidence as presented in PFF Nos. 258-60 and 263, inclusive.

4. Supplement CFF § I. with findings consistent with the law and the evidence as presented in PFF Nos. 2-5 and 6-18, inclusive.

5. Enter a new CFF § V., containing findings consistent with the law and the evidence as presented in PFF Nos. 173-76, inclusive.

6. Enter a new CFF § VI., containing findings consistent with the law and the evidence as presented in PFF Nos. 177-219 and 221-29, inclusive. And,

7. Enter a new CFF § VII., containing findings consistent with the law and the evidence as presented in PFF Nos. 264-67, inclusive.

As grounds for the foregoing requests, Plaintiffs say the following:

INTRODUCTION

This Court's purported findings of fact to which Plaintiffs object, or which they urge this Court to supplement, violate Federal Rule of Civil Procedure 52 for four basic reasons.

First, in general, this Court's findings do not contain "findings, in such detail and exactness as the nature of [this] case permits, of subsidiary facts on which the ulti-

² In Plaintiffs' Motion to the Special Master to Adopt Their Proposed Findings of Fact (8 December 1980), which Plaintiffs hereby incorporate by reference herein.

mate [factual] conclusion[s] * * * can rationally be predicated".³

[3] Second, this Court's findings in large measure rest on faulty legal premisses.⁴ Although the Court recognized that Defendants Minnesota Community College Faculty Association (MCCFA), Minnesota Education Association (MEA), National Education Association (NEA), and Independent Minnesota Political Action Committee for Education (IMPACE) have the burden of proof in this case,⁵ by clear and convincing evidence,⁶ the Court's findings reflect no such assignment of that weighty burden, but indicate only the imposition of a lesser burden, or of no burden at all.⁷

³ *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 420 (1943). *Accord, e.g.*, *Dalehite v. United States*, 346 U.S. 15, 24 n.8 (1953); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 212 & n.15 (8th Cir. 1974) (Lay, Heaney, & Devitt, JJ.); *B. F. Goodrich Co. v. Latex Prods., Inc.*, 400 F.2d 401, 402-03 (6th Cir. 1968), *S. S. Silberblatt, Inc. v. United States*, 353 F.2d 545, 549-50 (5th Cir. 1965); *Woods Construction Co. v. Pool Construction Co.*, 314 F.2d 405, 406-07 (10th Cir. 1963); *Kruger v. Purcell*, 300 F.2d 830, 831 (3d Cir. 1962); *Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955); *Dearborn Nat'l Casualty Co. v. Consumers Petroleum Co.*, 164 F.2d 332, 333 (7th Cir. 1947).

⁴ *E.g.*, *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-44 (1960); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948); *Municipal Bond Corp. v. Commissioner*, 341 F.2d 683, 686 (8th Cir. 1965) (Van Oosterhout, Blackmun, & Mehaffy, JJ.); *Minneapolis, St. P. & S.St. M.R.R. v. Metal-Matic, Inc.*, 323 F.2d 903, 912 (8th Cir. 1963) (Vogel, Blackmun, and Ridge, JJ.); *Manning v. M/V "Sea Road"*, 417 F.2d 603, 607 (5th Cir. 1969); *MacMullen v. South Carolina Elec. & Gas. Co.*, 312 F.2d 662, 670 (4th Cir. 1963).

⁵ CFF at 2 & n.1.

⁶ *Post*, pp. 18-19 & nn.73-80.

⁷ *E.g.*, *Lewis v. Pennington*, 400 F.2d 806, 816 (6th Cir. 1968).

Again, although the Court recognized that an important issue in this case is whether MCCFA, MEA, NEA, IMPACE, and NEA's political-action arm, the National Education Association Political Action Committee (NEA-PAC), together form a single, integrated state- and nationwide organization that styles itself the United Teaching Profession (UTP),⁸ the Court's findings reflect little or no [4] consideration, let alone application, of the basic legal standards of organizational integration.⁹ Again, although the Court recognized that an important issue in this case is whether the UTP is a political-action, or predominantly political organization,¹⁰ the Court's findings reflect little or no consideration, let alone application, of the basic legal standards applicable to such organizations.¹¹ And finally, although perhaps the most important evidence in this case on the subjects of integration, the predominantly political nature of the UTP, and the political-economic structure and effects of Minnesota's Public Employment Labor Relations Act (PELRA)¹² came from the uncontradicted—indeed, unchallenged—testimony of expert-witnesses in the disciplines of organizational science,¹³ political science,¹⁴ political econ-

⁸ See CFF § II.A.

⁹ See Plaintiffs' Legal Appendix on Integration (LAI), attached hereto and incorporated by reference herein. Plaintiffs earlier made this analysis available to the Court in their Report to the Court on the Status of the Case as of the Pre-Trial Hearing of 19 November 1979 (19 November 1979), and in their Motion to the Court to Reject the Special Master's Report (15 April 1981).

¹⁰ See CFF §§ II.B. and II.C.

¹¹ See Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293 (1978).

¹² Minn. Stat. § 179.61 *et seq.*

¹³ PFF Nos. 29-42.

¹⁴ *Id.* Nos. 103-20. See *id.* Nos. 134-40.

omy and economics,¹⁵ political theory,¹⁶ industrial and labor relations,¹⁷ and accounting,¹⁸ the Court's findings [5] reflect essentially no consideration, let alone application, of the experts' conclusions—notwithstanding that each of the subjects on which they testified lies beyond the competence of laymen.¹⁹

Third, with respect to the issues of the integration and predominantly political character of the UTP, this Court's findings provide no substantial support for its ultimate conclusions, because those findings: (i) in large part mechanically adopt the findings the UTP originally proposed,²⁰ even though Plaintiffs exposed the fraudulence of

¹⁵ *Id.* Nos. 181-85, 187, 189-93, 195-207, 213-15.

¹⁶ *Id.* Nos. 216-19.

¹⁷ *Id.* Nos. 181-88, 194, 208-12, 214.

¹⁸ *Id.* Nos. 145-54, 158-60.

¹⁹ *See, e.g.,* *Stafos v. Missouri P.R.R.*, 367 F.2d 314, 317 (10th Cir. 1966); *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1971); *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193-94 (5th Cir. 1970); *Loesch & Green Construction Co. v. Commissioner*, 211 F.2d 210, 211-12 (6th Cir. 1954); *Capitol Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942). *See also* *Cullers v. Commissioner*, 237 F.2d 611, 616 (8th Cir. 1956); *Planters' Operating Co. v. Commissioner*, 55 F.2d 583, 585-86 (8th Cir. 1932); *J. H. Robinson Truck Lines v. Commissioner*, 183 F.2d 739, 740 (5th Cir. 1959); *Pittsburgh Hotels Co. v. Commissioner*, 43 F.2d 345, 347 (3d Cir. 1930); *Boggs & Buhl, Inc. v. Commissioner*, 34 F.2d 859, 869-71 (3d Cir. 1919); *Watjen v. Louisville Tobacco Warehouse Co.*, 29 F.2d 801, 802-03 (6th Cir. 1928).

²⁰ *See* Table, *post*, pp. 20a-20g.

those proposals on two earlier occasions,²¹ and it was the Court's duty to review the record impartially and independently;²² (ii) rely on inadmissible or otherwise uncreditable testimony [6] or physical evidence;²³ (iii) state supposed "facts" the record demonstrates are false; (iv) misrepresent the true import of facts the record does establish; (v) contradict each other, or belie the Court's ultimate conclusions;²⁴ (vi) are against the clear weight of the undisputed evidence;²⁵ and (vii) where correct, self-evidently support Plaintiffs' contentions, not those of Defendants.

Fourth, notwithstanding the unchallenged expert-witnesses Plaintiffs and the Defendant State Officials called to testify on the subjects of integration, the predominantly

²¹ See Plaintiffs' Motion to the Special Master to Reject the UTP Defendants' Proposed Findings of Fact (18 December 1980); Plaintiffs' Motion to the Court to Reject the Special Master's Report (15 April 1981).

²² *E.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-57 & n.4 (1964); Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1226, 1339-40 (9th Cir. 1971); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1008-10 (1st Cir. 1970); *In re Flora Mir Candy Corp.*, 432 F.2d 1060, 1062 & n.2 (2d Cir. 1970); Roberts v. Ross, 344 F.2d 747, 752-53 (3d Cir. 1965); Louis Dreyfus & Cie. v. Panama Canal Co., 298 F.2d 733, 737-39 (5th Cir. 1962); The Severance, 152 F.2d 916, 918 (4th Cir. 1945); United States v. Forness, 125 F.2d 928, 940-41 (2d Cir. 1941).

²³ *E.g.*, Smallfield v. Home Ins. Co. of New York, 244 F.2d 337, 341 (9th Cir. 1957).

²⁴ *E.g.*, Ayers v. Pastime Amusement Co., 283 F. Supp. 773, 786 (D.S.C. 1968).

²⁵ *E.g.*, United States v. Oregon Medical Society, 343 U.S. 326, 339 (1952); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Parke-Davis & Co. v. Stromsodt, 411 F.2d 1390, 1394 (8th Cir. 1969) (collecting authorities); Lentz v. Metropolitan Life Ins. Co., 428 F.2d 36, 39 (5th Cir. 1970).

political character of the UTP, and particularly the political-economic structure and effects of PELRA, the Court's findings say next to nothing²⁶ about the expert-testimony concerning these crucial issues.²⁷

[7]

ARGUMENT

I. THIS COURT'S FINDINGS NEITHER SUPPORT DIRECTLY, NOR EXPLAIN THE BASES FOR, ITS ULTIMATE CONCLUSIONS.

Under Rule 52, this Court had a duty "to find the facts on every material issue, including relevant subsidiary issues, and to 'state separately' its conclusion thereon with clarity".²⁸ The latter duty is particularly urgent in cases, such as this, involving First-Amendment and other fundamental constitutional rights, where the clear-and-convincing-evidence standard applies.²⁹ Here, however, the Court failed, neglected, or refused to make such comprehensive findings, adopting instead the UTP's inaccurate or fraudulent version of certain selected "facts", and remaining silent on the great mass of other, contrary evidence—including undisputed expert-testimony—that Plaintiffs and the Defend-

²⁶ The Court's only comment on any of the expert-witnesses is the single, cryptic phrase: "we have considered the testimony of Professors Schneier and Morgan [in organizational science]". CFF at 7. What the Court "considered", and *why*, it leaves for speculation. By exclusion, the Court's reference to Professors Schneier and Morgan indicates that it did not even "consider" the testimony of Plaintiffs' experts Professor Tullock (political science), Professor Krauss (political economy), Dr. Bradley (economics), or Mr. Petro (political theory), or of the Defendant State Officials' expert Professor Derber (labor and industrial relations).

²⁷ *E.g.*, *Deal v. Cincinnati Board of Educ.*, 369 F.2d 55, 63-65 (6th Cir. 1966).

²⁸ *Kruger v. Purcell*, 300 F.2d 830, 831 (3d Cir. 1962).

²⁹ *See, e.g.*, *Schneiderman v. United States*, 320 U.S. 118, 119-20 (1943).

ant State Officials adduced. The effect of this course of action is to protect, to perpetuate, and further to promote the "cover-up" the UTP has conducted throughout these proceedings, and to render more difficult appellate review by the Supreme Court of the serious constitutional issues this case presents.

A. This Court had a duty independently to review the record, and make comprehensive findings on all material issues of fact.

Even in the absence of special constitutional considerations, under Rule 52 "there must be findings * * * which are sufficient to indicate the factual basis for the [trial- [8] court's] ultimate conclusion".³⁰ Two reasons particularly apposite in the instant case support this requirement: (i) "to cause the trial judge to fully and conscientiously consider the basis for his decision"; and (ii) "to aid appellate review by affording a clear and concise statement of the basis for the court's decision".³¹ Indeed, especially because this case is appealable directly to the Supreme Court,³² "[s]tatements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. * * * Otherwise, th[e] findings are useless for appellate purposes".³³

³⁰ *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943). *Accord, e.g.*, *B. F. Goodrich Co. v. Latex Prods., Inc.*, 400 F.2d 401, 402-03 (6th Cir. 1968); *S. S. Silberblatt, Inc. v. United States*, 353 F.2d 545, 549 (5th Cir. 1965); *Dearborn Nat'l Casualty Co. v. Consumers Petroleum Co.*, 164 F.2d 332, 333 (7th Cir. 1947).

³¹ *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 212 n.15 (8th Cir. 1974) (Lay, Heaney, & Devitt, JJ.).

³² *Compare* 28 U.S.C. §§ 1253, 2281 (1976) *with* Pub.L. 94-381, § 7, 90 Stat. 1119, 1120, *and with* *Knight v. Alsop*, 535 F.2d 466 (8th Cir. 1976).

³³ *Dalehite v. United States*, 346 U.S. 15, 24 n.8 (1953).

In general, Rule 52 mandates "findings of fact * * * as to each and every issue raised by the parties and remaining before [the court] at the conclusion of the trial",³⁴ including "ultimate findings of fact" and "such subsidiary findings of fact as will support the ultimate conclusion[s] reached by the [9] court".³⁵ These subsidiary findings "must be made in sufficient detail and exactness"³⁶ and "should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision".³⁷ Especially in "the application of factual findings to * * * ultimate judgment[s]", "[t]hese [subsidiary] findings may not be left unarticulated. If they actually were reached in the process of arriving at the ultimate factual conclusion[s], they must be stated. If they did not enter into the process * * *, then [those conclusions are] without any supporting foundation".³⁸ And nowhere is this rule more demanding than in litigation involving serious constitutional issues, where the trial-court was "confronted * * * with an enormous amount of [documentary] evidence * * *, in addition to a substantial amount of oral testimony, expert and otherwise".³⁹

Where (as in this litigation) First-Amendment and other fundamental constitutional freedoms are involved, the re-

³⁴ *Woods Construction Co. v. Pool Construction Co.*, 314 F.2d 405, 406-07 (10th Cir. 1963). *Accord*, *Kruger v. Powell*, 300 F.2d 830, 831 (3d Cir. 1962).

³⁵ *Dearborn Nat'l Casualty Co. v. Consumers Petroleum Co.*, 164 F.2d 332, 333 (7th Cir. 1947).

³⁶ *S. S. Silberblatt, Inc. v. United States*, 353 F.2d 545, 549 (5th Cir. 1965).

³⁷ *Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955).

³⁸ *O'Neill v. United States*, 411 F.2d 139, 146 (3d Cir. 1969).

³⁹ *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 64 (6th Cir. 1966).

quirement of "comprehensive and pertinent"⁴⁰ findings becomes peculiarly urgent and compelling. For, in such cases, the appellate courts—or, as here, the Supreme Court—must [10] determine for themselves if the totality of the evidence satisfies the strict standard of proof involved.⁴¹ This Court has recognized that the basic issue in the instant case is "[w]hether it is constitutional, under the First and Fourteenth Amendments, for [MCCFA] to act as 'exclusive representative' of plaintiffs pursuant to [PELRA]".⁴² And it has

allocated the burden of proof as follows: plaintiffs must establish that exercise of a specific constitutional right is impaired by the challenged statute * * * and that such a right is deemed a fundamental one. If the plaintiffs meet this burden, the defendants must then demonstrate that there is a compelling legitimate state interest served by the challenged statute * * * which outweighs the impairment of the protected right, and that no less restrictive means are reasonably available to pursue such compelling interest.⁴³

That "exclusive representation" under PELRA impairs Plaintiffs' fundamental constitutional freedoms of speech and association is beyond dispute. In general, where an individual has a constitutional, statutory, or common-law

⁴⁰ *Id.* at 63.

⁴¹ See *Schneiderman v. United States*, 320 U.S. 118, 129-30 (1943); *Chaunt v. United States*, 364 U.S. 350, 353 (1960); *Knaur v. United States*, 328 U.S. 654, 657-58 (1946); *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944); *Gonzalez-Jasso v. Rogers*, 264 F.2d 584, 586-87 (D.C. Cir. 1959).

⁴² CFF at 1.

⁴³ *Id.* at 2 (footnote omitted), citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Elrod v. Burns*, 427 U.S. 347 (1976).

right or privilege to speak or act, he has an associational right or privilege of constitutional dimension to speak or act through [11] a "representative" or "spokesman".⁴⁴ Logically, then, where a statute such as PELRA compels individuals such as Plaintiffs, as a condition of public employment, to "meet and negotiate"⁴⁵ with their employer through an "exclusive representative" such as MCCFA, the statute imposes an associational relationship upon those individuals, arguably in violation of their freedom not to associate with persons, groups, or causes that they oppose.⁴⁶ More specifically, on two occasions the Supreme Court has explicitly recognized that compelling employees in either public- or private-sector employment to provide financial support to a statutorily designated "exclusive representative" "has an impact upon [the employees'] First Amend-

⁴⁴ *E.g.*, *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-7 (1964); *District 12, UMW v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-24 (1967).

Of course, there is *no* constitutional right to serve as an "exclusive representative", or even to engage in collective negotiations with a public or a private employer. *Smith v. Local 1315, Arkansas State Highway Employees*, — U.S. —, —, 99 S. Ct. 1826, 1827-28 (1979). Therefore, the UTP cannot claim that it is exercising some right of Plaintiffs' "on their behalf", or that there exists a "conflict" between its and Plaintiffs' First-Amendment rights.

⁴⁵ Minn. Stat. § 179.63, subd. 16, defines "meet and negotiate" as "the performance of the mutual obligations of public employers and exclusive representatives of public employees to meet at reasonable times, including where possible meeting in advance of the budget-making process, with the good faith intent of entering into an agreement with respect to terms and conditions of employment; provided, that by such obligation neither party is compelled to agree to a proposal or required to make a concession".

⁴⁶ *See Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-35 (1977) (opinion of Stewart, J.). *Cf. Democratic Party v. LaFollette*, — U.S. —, —, 101 S. Ct. 1010, 1018-19 & n.22 (1981).

ment interests”⁴⁷ and amounts to “forced association”.⁴⁸ Yet, as is obvious [12] on the face of the statutes authorizing “exclusive representatives” to extract compulsory payments from employees,⁴⁹ the license to demand such payments derives from the power to act as “exclusive representative” in the first instance.⁵⁰ Therefore, self-evidently, if compulsory financial support of an “exclusive representative” involves forced association, the statutory authorization of “exclusive-representational” status must also implicate associational issues of constitutional dimension. The *derivative* privilege to seize dissenting employees’ monies cannot logically constitute forced association if the *primary* privilege upon which it rests does not.⁵¹

⁴⁷ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (opinion of Stewart, J.).

⁴⁸ *IAM v. Street*, 367 U.S. 740, 749 (1961).

⁴⁹ *E.g.*, PELRA, Minn. Stat. § 179.65, subd. 2; Railway Labor Act, § 2, Eleventh, 49 U.S.C. § 152, Eleventh (1976); National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

⁵⁰ *See* *Railway Employees’ Dep’t v. Hanson*, 351 U.S. 225, 235, 238 (1956); *IAM v. Street*, 367 U.S. 740, 761, 768-69 (opinion of the Court), 776 (Douglas, J., concurring) (1961); *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41 (1963); *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 415-16 (1976); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221-22, 225-26, 232 (1977) (opinion of Stewart, J.); *Robbinsdale Educ. Ass’n v. Robbinsdale Fed’n of Teachers, Local 872*, 307 Minn. 96, 98, 105, 239 N.W.2d 437, 439, 443, *vacated on other grounds*, 429 U.S. 880 (1976).

⁵¹ Indeed, the Supreme Court made a special point of holding in unequivocal fashion that merely “contributing [monies] to an organization for the purpose of spreading a political message” is an aspect of free association and speech, precisely because there once existed some doubt on that score. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 & n.30 (1977) (opinion of Stewart, J.).

In addition to the logical and legal cause-and-effect relationship between "exclusive representation" and forced association, and notwithstanding this Court's studied evasion [13] of the issue,⁵² the record in this case provides overwhelming evidence that "exclusive representation" by MCCFA impairs Plaintiffs' freedoms of speech and association.⁵³

This being so, according to this Court's own allocation of the burden of proof, Defendants must demonstrate: (i) that PELRA's impairment of Plaintiffs' liberties serves a definitely specified, legitimate, and important governmental goal;⁵⁴ (ii) that "exclusive representation" serves "over-

⁵² In CFF § IV.A.2., the Court purports to find that "[t]he only statutorily-imposed relationship between plaintiffs and MCCFA, MEA and NEA involves the deduction of a fair share fee from the plaintiffs that is paid to MCCFA as the exclusive bargaining representative of community college faculty, a portion of which is paid to MEA and NEA". On the one hand, if the Court means that "exclusive representation" is *not* a "statutorily-imposed relationship", it contradicts its own earlier statement that the constitutionality of "exclusive representation" *pursuant to PELRA* is at issue here. *Id.* at 1. On the other hand, if the Court means that, although PELRA imposes a relationship between Plaintiffs and MCCFA through "exclusive representation", the only relationship it imposes between Plaintiffs and MEA and NEA involves the payment of "fair-share fees", the Court is wrong for two reasons: (i) because the imposition of "fair-share fees" arises out of "exclusive representation", and in no other way; and (ii) because MCCFA, MEA, and NEA are integrated in the UTP, through the mutual transfer of "fair-share fees" and in numerous other particulars. *See post*, pp. 44-51, 81-83, 89-99, 168-93.

⁵³ PFF Nos. 258-63.

⁵⁴ *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546, 550-51 (1963); *NAACP v. Button*, 371 U.S. 415, 439-44 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 525-27 (1960).

riding" and "compelling" public interests;⁵⁵ and (iii) that PELRA achieves these interests in the manner [14] least-restrictive of Plaintiffs' freedoms.⁵⁶ Absent such a demon-

⁵⁵ *E.g.*, *Branti v. Finkel*, — U.S. —, —, 100 S. Ct. 1287, 1293 (1980); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Bridges v. California*, 314 U.S. 252, 263 (1941); *see Kirchberg v. Feenstra*, — U.S. —, —, 101 S. Ct. 1195, 1198 & n.7 (1981); *Michael M. v. Superior Court*, — U.S. —, — 101 S. Ct. 1200, 1215-16 (1981) (Brennan, J., dissenting).

⁵⁶ *E.g.*, *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (opinion of Brennan, J.), *citing* *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973); *United States v. Robel*, 389 U.S. 258 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); *United States v. O'Brien*, 391 U.S. 367 (1968); *and Buckley v. Valeo*, 424 U.S. 1, 17 (1976). *Accord*, *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977); *Buckley v. Valeo*, 424 U.S. 1, 238-39 (1976) (Burger, C.J., concurring and dissenting in part); *Hynes v. Oradell*, 425 U.S. 610, 625 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 83-84 (1976) (Powell, J., concurring); *id.* at 94-96 (Blackmun, Brennan, Marshall, and Stewart, JJ., dissenting); *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972); *Brown v. Oklahoma*, 408 U.S. 909, 912-13 (1972) (Rehnquist and Blackmun, JJ., and Burger, C.J., dissenting); *Gooding v. Wilson*, 405 U.S. 518, 522-23 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (Brennan, White, and Marshall, JJ., dissenting and concurring in part); *Dandridge v. Williams*, 397 U.S. 471, 484 (1970); *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring); *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961); *Shelton v. Tucker*, 364 U.S. 479, 485-90 (1960); *Talley v. California*, 362 U.S. 60, 64 (opinion of the Court), 66-67 (Harlan, J., concurring) (1960); *Schneider v. Town of Irvington*, 308 U.S. 147, 162-64 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938); *see Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964); *United States v. Robel*, 389 U.S. 258, 264-68 & n.20 (1967).

stration, the presumption of the unconstitutionality of "exclusive representation" under PELRA becomes conclusive.⁵⁷ Two separate issues are involved here, though.

First, whether "exclusive representation" is unconstitutional because it effectively delegates to MCCFA, a private, [15] self-interested organization, some portion of the sovereignty of the State of Minnesota in so far as establishing terms and conditions of employment in the community colleges is concerned,⁵⁸ licenses MCCFA to participate in the promulgation of "economic laws" binding on Plaintiffs and other persons,⁵⁹ and thereby provides MCCFA with a special, monopolistic legal opportunity and ability to influence the course of governmental action in Minnesota which no

⁵⁷ The presumptive unconstitutionality of State statutes that impinge upon First-Amendment and other fundamental freedoms has long been the rule. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne Cty.*, 393 U.S. 175, 181 (1968); *DeGregory v. Attorney General*, 383 U.S. 825, 829 (1966); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958); *United States v. CIO*, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

⁵⁸ See *Winston-Salem/Forsyth County Unit, Educators' Ass'n v. Phillips*, 381 F. Supp. 644, 647-48 & n.4 (M.D.N.C. 1974) (three-judge court). See Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974).

⁵⁹ See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (opinion of the Court); 318 (Hughes, C.J., concurring) (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 252-53 (1977) (Powell, J., concurring in the judgment). See Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", *Gov't Union Rev.*, Vol. 2, No. 1, at 56 (Winter 1981).

other individuals or groups in the State share.⁶⁰ Although the Court says nothing on this matter in its findings, the record amply establishes—with uncontradicted expert-testimony adduced by both Plaintiffs and the Defendant State Officials—that “exclusive representation” under PELRA has these effects.⁶¹ Moreover, the record reveals *no* “compelling”, legitimate, or even rational governmental goals that might arguably support transferring to MCCFA [16] such extraordinary powers—and this Court, by its silence on the subject, admits as much.

The second issue is whether “exclusive representation” is unconstitutional because: (i) PELRA requires Plaintiffs to associate with MCCFA as a condition of their employment in the community colleges; (ii) MCCFA is integrated with MEA, NEA, IMPACE, and NEA-PAC in the UTP; and (iii) the UTP is a political-action, or predominantly political organization indistinguishable (for all relevant purposes of constitutional law) from a *soi-disant* political party or political pressure-group.⁶² Although this Court

⁶⁰ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 228 (opinion of Stewart, J.), 257-58 & n.12 (Powell, J., concurring in the judgment) (1977); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-92 (1978); *Baldwin v. Redwood City*, 540 F.2d 1360, 1366 (9th Cir. 1976); *Winston-Salem/Forsyth County Unit, Educators' Ass'n v. Phillips*, 381 F. Supp. 644, 647-48 (M.D.N.C. 1974) (three-judge court). See Summers, “Public Sector Collective Bargaining Substantially Diminishes Democracy”, *Gov't Union Rev.*, Vol. 1, No. 1, at 5 (Winter 1980); E. Vieira, Jr., “*To Break and Control the Violence of Faction*”: *The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Arlington, Va.: Foundation for the Advancement of the Public Trust, 1980).

⁶¹ PFF Nos. 177-219, 221-29.

⁶² See *Branti v. Finkel*, — U.S. —, —, 100 S. Ct. 1287, 1293-95 (1980); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 243-44 (Rehnquist, J., concurring), 256-57 (Powell, J., concurring in

claims in its findings that MCCFA, MEA, NEA, IMPACE, and NEA-PAC do not form a single, integrated organization,⁶³ and that MCCFA, MEA, and NEA are not predominantly political in character,⁶⁴ the record conclusively establishes exactly the opposite—again, with uncontradicted expert-testimony and massive admissions from the UTP itself.⁶⁵ Moreover, the record indicates *no* “compelling”, legitimate, or even rational governmental goal that might arguably support the requirement that Plaintiffs associate with a political-action organization as a condition of public employment⁶⁶—and this Court, [17] having pretended to find that the UTP does not exist, and that its component parts do not partake of its predominantly political character, says nothing on this subject, either.

Plaintiffs, of course, admit the *theoretical* possibility, unfulfilled in this case, that Defendants could have satisfied their burden of proof—or, if Plaintiffs had had the burden of proof, could have rebutted Plaintiffs’ *prima facie* case⁶⁷

the judgment) (1977). See Vieira, “Are Public-Sector Unions Special Interest Political Parties?”, 27 *DePaul L. Rev.* 293 (1978). Interestingly, this Court placed the burden of proof concerning its political character squarely on the UTP. CFF at 2 n.1.

⁶³ CFF § II.A.

⁶⁴ *Id.* §§ II.B. and II.C.

⁶⁵ PFF Nos. 25-172.

⁶⁶ No such interest exists, as a matter of law. Council 34, Illinois State Employees Union v. Lewis, 473 F.2d 561, 572 (7th Cir. 1972); Cullen v. New York Civil Serv. Comm’n, 435 F. Supp. 546, 552 (E.D.N.Y. 1977); see Gavett v. Alexander, 477 F. Supp. 1035, 1047 (D.D.C. 1977).

⁶⁷ Plaintiffs introduced more-than-sufficient evidence to establish a *prima facie* case on every factual issue: *e.g.*, (i) the UTP’s integration, PFF Nos. 25-56; (ii) the UTP’s predominantly political

—by adducing admissible, cogent evidence disproving that: (i) PELRA delegates a portion of Minnesota's sovereignty to MCCFA;⁶⁸ (ii) PELRA licenses MCCFA to make "economic laws" binding on Plaintiffs and others;⁶⁹ (iii) PELRA discriminatorily enhances the legal ability of MCCFA to influence governmental decision-making;⁷⁰ (iv) MCCFA is itself an [18] organization predominantly political in character;⁷¹ and (v) MCCFA is integrated in the

character, *id.* Nos. 57-140; (iii) the structure and political effects of PELRA as applied in the community colleges, *id.* Nos. 202-29; (iv) forced association of Plaintiffs with MCCFA, *id.* Nos. 258-63.

Indeed, not only is this evidence "sufficient to render reasonable a conclusion in favor of [Plaintiffs'] allegations", but also it "establishes a presumption in favor of [Plaintiffs'] contention[s] * * *, and shifts the risk of non-persuasion * * * to" Defendants. *Husbands v. Pennsylvania*, 395 F. Supp. 1107, 1139 (E.D. Pa. 1975) (defining "*prima facie* case" in these terms). On these issues, moreover, Defendants' evidence did not rise to a *prima facie* level, even had Plaintiffs had the ultimate burden of proof. *See* PFF Nos. 141-76. Therefore, Plaintiffs' *prima facie* case is conclusive. *See, e.g., G. H. Miller & Co. v. United States*, 260 F.2d 286, 288 (7th Cir. 1958).

⁶⁸ Expert-witnesses for both Plaintiffs and the Defendant State Officials agreed on this. PFF Nos. 208-19. The UTP adduced no evidence concerning this subject.

⁶⁹ Expert-witnesses for both Plaintiffs and the Defendant State Officials agreed on this. *Id.* Nos. 177-201. The UTP adduced no evidence concerning this subject.

⁷⁰ Two expert-witnesses testified for Plaintiffs on this matter. *Id.* Nos. 221-29, 263. Defendants adduced no evidence of their own.

⁷¹ One expert-witness testified for Plaintiffs. *Id.* Nos. 103-20, 134-40. The record also contains numerous admissions of the UTP as to its predominantly political character. *Id.* Nos. 57-97, 121-33. Defendants adduced no admissible or creditable rebuttal-evidence of their own. *See id.* Nos. 141-72.

UTP.⁷² But, to accomplish this result where Plaintiff's fundamental First- and Fourteenth-Amendment freedoms are involved, Defendants would have had to adduce *clear and convincing* evidence in support of their position.⁷³

"Clear and convincing evidence" is "that class of evidence which commands respect, and * * * produces conviction",⁷⁴ "that solidity of proof which leaves no troubling doubt".⁷⁵ It is not merely what a reasoning man might conclude, but (where fundamental liberties are at stake) is "substantially identical with * * * proof beyond a reasonable doubt".⁷⁶ [19] Thus, evidence fails to satisfy this

⁷² Two expert-witnesses testified for Plaintiffs on this subject. *Id.* Nos. 29-42. The record also contains numerous admissions of the UTP as to its integrated nature. *Id.* Nos. 43-56. Defendants offered no rebuttal-evidence of their own.

⁷³ *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50-52 (1971) (opinion of Brennan, J.); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82-83 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981); *Bruns v. Pomerleau*, 319 F. Supp. 58, 66 (D. Md. 1970). *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276-77 (1971).

⁷⁴ *Maxwell Land-Grant Case*, 121 U.S. 325, 381-82 (1887).

⁷⁵ *Baumgartner v. United States*, 322 U.S. 665, 670 (1944). *Accord*, *Schneiderman v. United States*, 320 U.S. 118, 125, 135, 136 (1943), *applied in First-Amendment context in Pennekamp v. Florida*, 328 U.S. 331, 347-48 (1946).

⁷⁶ *Klapprott v. United States*, 335 U.S. 601, 612-13 (opinion of the Court), 617 & n.2 (Rutledge, J., concurring in the result) (1949), *applying Schneiderman v. United States*, 320 U.S. 118, 153-54 (1943). *But cf. in the special context of obscenity Cooper v. Mitchell Bros.' Santa Ana Theater*, — U.S. —, 102 S. Ct. 172 (1981).

rigorous requirement if it amounts to mere suspicion," is subject to two possible interpretations,⁷⁸ or rests on the statements of "[w]itnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves".⁷⁹

Because this case involves Plaintiffs' fundamental personal liberties, and requires that Defendants prevail (if at all) only upon a demonstration of all the constitutional facts with clear and convincing evidence,⁸⁰ this Court had an especially important responsibility to compile findings of subsidiary and ultimate facts specifying with particu-

⁷⁷ *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 300 (1888). Mere suspicion, speculation, or guesses do not constitute even substantial, let alone clear and convincing, evidence. *E.g.*, *Moore v. Chesapeake & O. Ry.*, 340 U.S. 573, 577-78 (1951) ("[s]peculation cannot supply the place of proof"); *Solomon v. Northwestern State Bank*, 327 F.2d 720, 723 (8th Cir. 1964) ("[f]indings cannot be based on speculation and conjecture"); *Arena Co. v. Minneapolis Gas Co.*, 234 F.2d 451, 459 (8th Cir. 1956); *Cupples Co. Manufacturers v. NLRB*, 106 F.2d 100, 104-05 (8th Cir. 1939) ("suspicion and conjecture proves nothing"); *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 345-46 (9th Cir. 1978) ("verdict * * * cannot rest on guess or speculation"); *Moorison-Knudsen Co. v. NLRB*, 276 F.2d 63, 72-73 (9th Cir. 1960); *American Casualty Co. v. Myrick*, 304 F.2d 179, 183 (5th Cir. 1962) ("[s]urmise and speculation are inadequate"); *Controller of California v. Lockwood*, 193 F.2d 169, 172 (9th Cir. 1951) ("[s]uspicion * * * is not evidence"); *Commercial Casualty Inc. Co. v. Stinson*, 111 F.2d 63, 64 (6th Cir. 1940); *McDonald v. Robertson*, 104 F.2d 945, 948 (6th Cir. 1939).

⁷⁸ *Schneiderman v. United States*, 320 U.S. 118, 158-59 (1943).

⁷⁹ *The Barbed Wire Patent*, 143 U.S. 275, 284 (1892). On the particular applicability of this rule here, *see* PFF Nos. 161-67.

⁸⁰ *See e.g.*, *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 53-54 (1971) (opinion of Brennan, J.).

larity "upon what underlying facts [it] relied, and whether proper [legal] standards were observed",⁸¹ and showing that "the [20] totality of the evidence" in fact "rise[s] to the standard set by the Supreme Court".⁸² This, however, it failed to do.

B. With respect to the integration and predominantly political character of the United Teaching Profession, this Court's findings merely adopt the latter's unsubstantiated theory of the case, without an independent, impartial review of the evidence.

This Court claims that, "[b]efore adopting findings of fact, we carefully reviewed the trial record, the stipulations of fact, the parties' proposed findings of fact and the briefs in support thereof", and that its "findings * * * represent our independent judgment based on that review".⁸³ No doubt the Court's findings do accurately reflect the "review" it performed—although, as analysis reveals, they indicate that this "review" was anything but "carefu[l]".⁸⁴ Comparison of the Court's findings to the Special Master's Report, and of that Report to the UTP's proposed findings of fact, however, establishes that the Court's findings, far from "represent[ing an] independent judgment", merely incorporate directly, closely paraphrase, or summarize in conclusory fashion the UTP's theory of the case,⁸⁵

⁸¹ *Schneiderman v. United States*, 320 U.S. 118, 129-30 (1943).

⁸² *Gonzalez-Jasso v. Rogers*, 264 F.2d 584, 586-87 (D.C. Cir. 1959).

⁸³ CFF at 1.

⁸⁴ *Post*, pp. 167-225.

⁸⁵ See Table, *post*, pp. 20a-20g. (Footnotes 86-90 appear in the Table.)

which Plaintiffs have systematically debunked and exploded on two separate occasions heretofore.⁹¹

⁹¹ Plaintiffs' Motion to the Court to Reject the Special Master's Report (15 April 1981); Plaintiffs' Motion to the Special Master to Reject the UTP Defendants' Proposed Findings of Fact (18 December 1980).

[20a]

TABLE

This Table consists of six columns which record sections, numbers of findings, or pages from: (i) the Court's Findings of Fact and Order (16 November 1981); (ii) the Report of Leonard E. Lindquist, Special Master (23 March 1981); (iii) the Defendant Labor Organizations' Proposed Findings of Fact (no date); (iv) Plaintiffs' Motion to the Special Master to Adopt Their Proposed Findings of Fact (8 December 1980); (v) Plaintiffs' Motion to the Court to Reject the Special Master's Report (15 April 1981); and (vi) Plaintiffs' Motion to the Special Master to Reject the UTP Defendants' Proposed Findings of Fact (18 December 1980).

To use the Table to trace the history of an entry in the Court's findings, read from left to right. For example, sentence number 8 in section II.A.1. of the Court's findings derives from section V.1. of the Master's Report, which derives from the UTP's proposed finding number 115. Plaintiffs earlier refuted this alleged "fact" on pages 35-37 and 9, respectively, of their motions to reject the Special Master's report and the UTP's proposed findings.

| COURT'S FINDINGS | MASTER'S FINDINGS (No. ____) | UTP'S FINDINGS (No. ____) | PLAINTIFFS' FINDINGS (No. ____) | PLAINTIFFS' MOTIONS TO REJECT | |
|------------------|---------------------------------|------------------------------|---------------------------------------|-------------------------------|------------------|
| | | | | MASTER (p. ____) | UTP (p. ____) |
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| | 2 § I., No. 4(a) | | 45 | 23 | |
| | 3 § I., No. 4(a) | 79 | | 23 | |
| | 4 § I., No. 4(a) | 80 | | 23 | |
| | 5 § I., No. 4(a) | 81 | | 23 | |
| | 6 § V., No. 2 | 50, 52 | | 35-37 | 8 |
| | 7 § V., No. 4 | 161, 162 | | 35-37 | |
| | 8 § V., No. 1 | 115 | | 35-37 | 11 |
| | 9 § V., No. 6 | 99 | | 35-37 | 9 |
| § II.A., No. 2 | 1 § I., No. 4(b): | 60 | | 23 | 8 |
| | § V., No. 3 | | | 35-37 | |
| | 2 § I., No. 4(b) | 234-49 | | 23 | 21, 22 |
| | 3 § I., No. 4(b) | | 45 | 23 | |
| | 4 § V., No. 2 | 45, 46 | | 35-37 | 7, 8 |
| | 5 § V., No. 4: | 144 | | 35-37 | |
| | § II., No. 5 | 206 | | 25-26 | 20 |
| | 6 § V., No. 6 | 101 | | 35-37 | 9 |
| § II.A., No. 3 | 1 § I., No. 4(c) | 53 | | 23 | |
| | 2 § I., No. 4(a): | | 45 | 23 | |
| | § I., No. 4(c) | 43 | | 23 | 7 |
| | 3 § V., No. 7 | 169 | | 35-37 | 13 |
| | 4 § V., No. 7 | 170 | | 35-37 | 13 |
| | 5 | 172 | | | 13 |
| | 6 UTP Exhibit No. 68 | | | | |
| | 7 UTP Exhibit No. 68 | | | | |
| | 8 [§ II., No. 7] | | | | |

| COURT'S FINDINGS | | MASTER'S FINDINGS (No. ____) | UTP'S FINDINGS (No. ____) | PLAINTIFFS' FINDINGS (No. ____) | PLAINTIFFS' MOTIONS TO REJECT | |
|------------------|----|---------------------------------|------------------------------|---------------------------------------|-------------------------------|------------------|
| | | | | | MASTER (p. ____) | UTP (p. ____) |
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| | 10 | § V., No. 2 | 42, 43 | | 35-37 | 7 |
| | 11 | § V., No. 2 | 42 | | 35-37 | |
| | 12 | § V., No. 3 | 138-43 | | 35-37 | 12 |
| | 13 | § V., No. 1 | 113-14, 116 | | 35-37 | 11 |
| | 14 | § V., No. 1 | 113-14, 116 | | 35-37 | 11 |
| § II.A., No. 4 | 1 | § I., No. 4(d) | 93 | 17, 47 | 23-24 | |
| | 2 | § I., No. 4(d) | 95 | | 23-24 | 9 |
| | 3 | § I., No. 4(d) | 94, 96 | | 23-24 | |
| | 4 | § IV., No. 5 | 93, 129 | | 34 | 11 |
| | 5 | § V., No. 9 | 123 | | 35-37 | 11 |
| | 6 | § V., No. 9 | 166-68 | | 35-37 | 13 |
| | 7 | § V., No. 14 | 106, 123-25, 127-28 | | 38 | 10, 11 |
| § II.A., No. 5 | 1 | § I., No. 5 | | | 24 | |
| | 2 | § I., No. 5 | | 16, 46 | 24 | |
| | 3 | § I., No. 5 | See 131, 163 | | 24 | 12, 13 |
| | 4 | § V., No. 8 | 163 | | 35-37 | 13 |
| | 5 | § I., No. 5 | | | 24 | |
| | 6 | § V., No. 14 | 130 | | 38 | |
| | 7 | § V., No. 14 | 116, 163 | | 38 | 13 |
| § II.A., No. 6 | 1 | § V., No. 11 | 157, 164-67 | | | 13 |
| | 2 | | 157, 164-68 | | | 13 |
| | 3 | § V., No. 11 | 157, 165-66, 168 | | | 13 |
| | 4 | § II., No. 7 | 194 | | | |
| | 5 | § V., No. 10 | 169-73 | | | 13 |

| COURT'S FINDINGS | MASTER'S FINDINGS (NO. ____) | UTP'S FINDINGS (NO. ____) | PLAINTIFFS' FINDINGS (NO. ____) | PLAINTIFFS' MOTIONS TO REJECT | |
|------------------|---------------------------------|------------------------------|---------------------------------------|-------------------------------|------------------|
| | | | | MASTER (p. ____) | UTP (p. ____) |
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| | 7 | See Footnote 86 | | | |
| | 8 | § V., No. 3; | 42, 45, 50, 53, 60, 77 | 35-37 | 7, 8 |
| | | § V., No. 2 | | | |
| | 9 | § V., No. 5 | 97, 98 | 35-37 | 9 |
| | 10 | § V., No. 4 | 34-40, 144, 161-62 | 35-37 | 12 |
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| | 12 | See Footnote 87 | | | |
| | 13 | § I., No. 4(d): | | 16-17, 46-47 | 23-24 |
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| | 14 | 129-30 | | | 11 |
| § II.B., No. 1 | 1 | § II., No. 1 | 188 | | |
| | 2 | § II., No. 1 | 190 | | |
| | 3 | | 190 | | |
| | 4 | § II., No. 1 | 191, 192 | | |
| | 5 | § II., No. 1 | 193 | | |
| | 6 | § II., No. 1 | 193 | | |
| | 7 | § II., No. 2 | 196 | | |
| | 8 | UTP Exhibit No. 66 | | | |
| | 9 | § II., No. 3 | 201 | 24-25 | |
| | 10 | § II., No. 3 | 202 | 24-25 | |
| | 11 | UTP Exhibit No. 66 | | | |
| | 12 | See Footnote 88 | | | |
| § II.B., No. 2 | 1 | § II., No. 5 | 59 | 25-26 | 8 |
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| COURT'S FINDINGS | | MASTER'S FINDINGS (NO. ____) | UTP'S FINDINGS (NO. ____) | PLAINTIFFS' FINDINGS (NO. ____) | PLAINTIFFS' MOTIONS TO REJECT | |
|------------------|---|---------------------------------|----------------------------------------------|---------------------------------------|-------------------------------|------------------|
| | | | | | MASTER (p. ____) | UTP (p. ____) |
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| | 4 | § II., No. 6 | 207-77 | | 26 | 20-22 |
| | 5 | UTP Exhibit No. 47 | | | | |
| | 6 | See Footnote 59 | | | | |
| | 7 | § II., No. 7 | 194 | | | |
| | 8 | § II., No. 7 | 194 | | | |
| | 9 | § II., No. 7 | | | | |
| § II.B., No. 3 | 1 | § II., No. 8; | 294 | | 26-27 | |
| | | § II., No. 9 | | | | |
| | 2 | § II., No. 8; | 294-314 | | 26-27 | 23 |
| | | § II., No. 9 | | | | |
| § II.C., No. 1 | 1 | § I., No. 4(d); | | 16-17, 46-47 | 23-24 | |
| | | § I., No. 5 | | | | |
| | 2 | § I., No. 5; | | | 24, 23-24 | |
| | | § I., No. 4(d); | | | | |
| | | § III., No. 3 | | 65-66 [1] | | |
| | 3 | § IV., No. 5 | 129-130 | | 34 | 11 |
| § II.C., No. 2 | 1 | | | 49, 52-56 | | |
| | 2 | § III., No. 8 | 351 | | 30 | 26 |
| | 3 | § III., No. 8 | 351 | | 30 | 26 |
| | 4 | § III., No. 8 | 354 | | 30 | 26 |
| | 5 | | | | | |
| | 6 | § III., No. 7 | 324 | | 29-30 | |

| COURT'S FINDINGS | MASTER'S FINDINGS (No. ____) | UTP'S FINDINGS (No. ____) | PLAINTIFFS' FINDINGS (No. ____) | PLAINTIFFS' MOTIONS TO REJECT | |
|------------------|---------------------------------|-----------------------------------------|------------------------------------|-------------------------------|------------------|
| | | | | MASTER (p. ____) | UTP (p. ____) |
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| | 2 | § III, No. 3 | 133, 137 | | 12 |
| | 3 | § III, No. 5 | 342 | | 24 |
| | 4 | § III, No. 4 | 316, 318-321 | 29 | 23 |
| | 5 | § III, No. 4 | 318-21 | 29 | 23 |
| | 6 | § III, No. 1 | 321-22 | 27-28 | 23, 24 |
| § ILC, No. 4 | 1 | § III, No. 6 | 315 | 29 | 23 |
| § ILC, No. 5 | | (Summary) | | | |
| § IV.A., No. 1 | 1 | § IV., No. 5 | 93 | 34 | |
| | 2 | § IV., No. 5 | | 34 | |
| § IV.A., No. 2 | 1 | § IV., No. 1; See Headnote "D", p.9 | | 32-33, 33-34 | |
| | | § IV., No. 4 | | | |
| § IV.A., No. 3 | 1 | § IV., No. 2; 36-41 | | 33 | 34 |
| | | § IV., No. 3; | | | |
| | | § IV., No. 4 | | 33-34 | |
| | 2 | See Footnote 90 | | | |

[20g]**FOOTNOTES TO TABLE**

86. This sentence merely states an ultimate conclusion concerning the UTP's integration, or recites the Court's supposed "consider[ation]" of the record.

87. This sentence merely states an ultimate conclusion concerning the UTP, supposedly derived from the preceding findings.

88. This sentence merely states an ultimate conclusion concerning MCCFA, supposedly based on the record.

89. This sentence merely states an ultimate conclusion concerning MEA, supposedly based on the record.

90. This sentence merely states the legal conclusion that MCCFA owes a "duty of fair representation" to Plaintiffs and other faculty-members in the community colleges.

[21] Revealingly, this Court's findings purport to compress an extremely detailed record into a few pages on the crucial, complex issues of the UTP's integrated nature and predominantly political character. And the Court devotes no space at all to the issues of: (i) the equivalence of "exclusive representation" under PELRA, the National Industrial Recovery Act, and the Bituminous Coal Conservation Act;⁹² (ii) the adverse effects of PELRA on the public interest;⁹³ and (iii) the inroads PELRA makes on governmental and popular sovereignty.⁹⁴ In short, although altogether the parties originally submitted to the Special Master some 687 proposed findings, covering 250 pages,⁹⁵ the Court arrives at a set of findings with but 4 pages on integration, 4½ pages on the UTP's predominantly political character, and 0 pages on any of the three issues listed immediately heretofore. And, on these scant 8½ pages, the Court mechanically adopts the UTP's position, while simply pretending that the dispositive evidence Plaintiffs presented in their proposed findings does not exist.

Thus, reading this Court's imaginative, but inaccurate, version of the record, the Supreme Court would have no inkling that Plaintiffs' expert-witness in organizational science applied the standard criteria of integration to MCCFA, MEA, NEA, IMPACE, and NEA-PAC—finding that "beyond any reasonable doubt * * * the units function as one organization", the UTP,⁹⁶ and that there was "nothing [in the record] to [22] indicate that these units were

⁹² PFF Nos. 181-201.

⁹³ *Id.* Nos. 202-07.

⁹⁴ *Id.* Nos. 208-219, 221-29.

⁹⁵ Plaintiffs offered 270 proposed findings (165 pages), the UTP 358 (75 pages), and the Defendant State Officials 59 (10 pages).

⁹⁶ PFF No. 37.

not integrated".⁹⁷ Neither would the Supreme Court suspect that Plaintiffs' expert-witness in political science had testified that the record in this case is "more complete than [he had] even seen before on any political pressure group",⁹⁸ and that the UTP is an integrated, predominantly political organization.⁹⁹ Nor could the Supreme Court even guess that other crucial constitutional issues had been the subject of extensive, uncontradicted expert-testimony by witnesses for both Plaintiffs and the Defendant State Officials—witnesses who concurred on every material particular. To be sure, from this Court's statement that "[p]roceedings before the Special Master involved * * * 6,000 pages of transcript, the introduction of over 500 exhibits" and "the stipulations of fact" (themselves many hundreds of pages in length),¹⁰⁰ the Supreme Court should realize that the evidence in this case is monumental. But from this Court's performance in "summarizing" (or, more accurately, misrepresenting and ignoring) that evidence,¹⁰¹ the Supreme Court would likely assume that the great mass of the record contains testimony and documents favorable to the UTP—when, in fact, exactly the opposite is true.

Purported findings of this kind, mechanically drawn without independent scrutiny from the UTP's generally erroneous, [23] oft-times fraudulent proposals, constitute "an abandonment of the duty and the trust that has been placed in the [trial] judge by [Rule 52]".¹⁰² Here, as in the gen-

⁹⁷ *Id.* No. 40.

⁹⁸ *Id.* No. 111.

⁹⁹ *Id.* No. 116.

¹⁰⁰ CFF at 1.

¹⁰¹ *Post*, pp. 167-225.

¹⁰² Remarks of Circuit Judge J. Skelly Wright, *quoted with approval in United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 n.4 (1964).

eral case, this practice should be condemned, not con-
 doned.¹⁰³ Indeed, if this Court was justified in adopting the
 proposed findings of any party, it ought to have accepted
 Plaintiffs' proposed findings based on the uncontroverted
 testimony of the expert-witnesses in organizational science,
 political science, political economy, economics, political
 theory, and labor and industrial relations. This testimony,
 at least, concerned "highly technical issues" and "complex
 scientific problems"¹⁰⁴ the solution to which "requir[ed]
 expertise which the court does not possess".¹⁰⁵ *Yet this is
 precisely the testimony about which the Court says nothing,*
 except in one instance refusing even to acknowledge that
 such evidence exists in the record¹⁰⁶—precisely as the
 UTP's proposed findings more or less ignored it.

Therefore, "[w]hen these findings get to the [Supreme
 Court] they won't be worth the paper they are written on
 as [24] far as assisting the [Supreme Court] in determin-
 ing why [this Court] decided the case [as it did]".¹⁰⁷

¹⁰³ *E.g.*, *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339-40 (9th Cir. 1971); *Roberts v. Ross*, 344 F.2d 747, 752-53 (3d Cir. 1965); *The Severance*, 152 F.2d 916, 918 (4th Cir. 1945).

¹⁰⁴ *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1971).

¹⁰⁵ *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970). *Accord*, *In re Flora Mir Candy Corp.*, 432 F.2d 1060, 1062 & n.2 (2d Cir. 1970). *Cf.* *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 274-75 (1949).

¹⁰⁶ CFF at 7: "we have considered the testimony of Professors Schneier and Morgan [in organizational science]".

¹⁰⁷ Remarks of Circuit Judge J. Skelly Wright, *quoted with approval* in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 n.4 (1964).

C. Rather than promoting resolution of the serious constitutional issues in this case, this Court's findings perpetuate the United Teaching Profession's "cover-ups", and reward their perpetrators.

The substance and purport of this Court's findings—or lack of findings, as the case may be—on the issues of integration, the UTP's predominantly political character, and the political and economic structure and effects of PELRA are thus in keeping with the aberrant style in which the Court has conducted these proceedings from the very beginning of this litigation: First, erroneously dismissing Plaintiffs' constitutional claims against "exclusive representation" as "insubstantial",¹⁰⁸ even though in the only cases that ever addressed the issue the Supreme Court unanimously held systems of "exclusive representation" indistinguishable from PELRA's invalid under the Due Process Clause of the Fifth Amendment.¹⁰⁹ Second, refusing to discipline the UTP for the false, evasive, and incomplete testimony under oath of various of its officials and staff-personnel, and its [25] brazen suppression and destruction of documentary evidence, during discovery.¹¹⁰

¹⁰⁸ *Knight v. MCCFA*, No. 4-74 Civ. 659 (Memorandum and Order filed 23 December 1975) (Alsop, J.), *petition for mandamus granted sub nom. Knight v. Alsop*, 535 F.2d 466 (8th Cir. 1976) (ordering convention of statutory three-judge court).

¹⁰⁹ Compare PFF Nos. 181-201 with *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936); *A.L.A. Schechler Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). See Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", *Gov't Union Rev.*, Vol. 2, No. 1, at 56 (Winter 1981).

¹¹⁰ See Petitioners' Appendices, *In re Knight*, No. 79-1910 (8th Cir., filed 24 October 1979), *motion for leave to file petition for mandamus denied*, — U.S. —, 100 S. Ct. 185 (1979), *petition for mandamus denied*, 614 F.2d 1162 (8th Cir. 1980), *cert. denied*, — U.S. —, 101 S. Ct. 83 (1980). Notwithstanding denial of Plaintiffs' petition for mandamus, the UTP's discovery "cover-up"

Third, blinking the UTP's obdurate resistance to stipulating in good faith concerning facts Plaintiffs subsequently proved at trial.¹¹¹ Fourth, preventing Plaintiffs from compelling the UTP by subpoenae *duces tecum* to produce material documentary evidence at trial.¹¹² Fifth, whitewashing the UTP's trial "cover-up",¹¹³ that Plaintiffs had predicted months before¹¹⁴ and finally exposed through the diligence of their counsel in another case.¹¹⁵

will be an issue on appeal of this case to the Supreme Court. *See* McQueen v. Swenson, 537 F.2d 976, 978 (8th Cir. 1976) ("decision not to review the order in question by mandamus does not bar . . . review of the order on direct appeal").

¹¹¹ *See* Plaintiffs' Report to the Court on the Status of the Case as of the Pre-Trial Hearing of 19 November 1979 (19 November 1979), at 24-50. *See also* Transcript of the Hearing of 19 November 1979 Before the District Court, at 3-23.

¹¹² *See* Plaintiffs' Motion to Enforce Their Subpoenae *Duces Tecum* Against Various United Teaching Profession Witnesses, and to Require the Special Master to Allow Plaintiffs to Adduce Evidence at Trial Supportive of Adverse Inferences Against the United Teaching Profession Defendants (12 August 1980), *denied*, Order of the District Court of 3 September 1980. *See also* Transcript of the Hearing of 29 July 1980 Before the Special Master, at 10-42; Order of the Special Master of 4 August 1980.

¹¹³ *See* Plaintiffs' Motion to the Special Master to Re-Open the Trial Record, and for Sanctions Against the United Teaching Profession Defendants (3 February 1981), *denied*, Memorandum Order of the Special Master (6 March 1981), *denial aff'd*, Order of the District Court (30 March 1981).

¹¹⁴ *See* Plaintiffs' Memorandum in Support of their Motion to Enforce Subpoenae *Duces Tecum* Against Certain United Teaching Profession Witnesses, and to Permit Plaintiffs to Adduce Certain Testimonial Evidence Before the Special Master (12 August 1980), at 11.

¹¹⁵ *See* Plaintiffs' Motion to the Special Master to Re-Open the Trial Record, and for Sanctions Against the United Teaching Profession Defendants (3 February 1981), at 3-5.

[26] Now, notwithstanding extensive "cover-ups" by the UTP both before and during trial, Plaintiffs—on whom the Court did *not* place the burden of proof concerning the UTP's integrated, political character¹¹⁶—have adduced overwhelming proof that the UTP is integrated "beyond any reasonable doubt",¹¹⁷ and have prepared a record, "more complete than * * * ever seen before on any pressure group",¹¹⁸ exposing the UTP as a predominantly political organization. Yet, *mirabile dictu*, this Court nevertheless finds the "facts" in favor of the UTP—by refusing even to acknowledge the testimony of Plaintiffs' expert-witnesses;¹¹⁹ by misrepresenting the evidence or its legal implications;¹²⁰ by adopting gratuitous statements, arguments, and fabricated "evidence" from the UTP's attorneys as "fact";¹²¹ and by treating as established supposed legal "defenses" that the UTP did not even attempt to prove at trial, and which its own attorneys and witnesses conceded were unprovable from the documentary evidence it sought to introduce.¹²² Apparently, the lesson this litany teaches is that the party on whom the Court has placed the burden of proof in First- and Fourteenth-Amendment litigation can prevail, not by proving its case with clear and convincing evidence, but instead by falsifying and suppressing evidence, and by admitting that what evidence it does produce at trial is incompetent to demonstrate what needs [27] demonstration! Or, at least such a party can prevail *when it is the UTP*.

¹¹⁶ CFF at 2 n.1.

¹¹⁷ PFF No. 37 (testimony of Professor Schneier).

¹¹⁸ PFF No. 111 (testimony of Professor Tullock).

¹¹⁹ *Post*, pp. 44-51.

¹²⁰ *Post*, pp. 167-225.

¹²¹ *Post*, pp. 49-51, 218-19.

¹²² *Post*, pp. 51-73.

In short, this Court's purported findings of fact, far from advancing the real issues in this case, merely give further aid and comfort to the UTP's litigation-strategy of "cover-up".

D. Unless amended to conform to the law and the evidence, this Court's findings can only impede, not assist, the Supreme Court in its independent review of the record on appeal.

Because this Court has failed to scrutinize the record with an independent mind, and to prepare accurate, comprehensive findings on all material issues of fact, but instead has mechanically adopted the UTP's position in the teeth of the overwhelming contrary proofs Plaintiffs adduced, the Court's findings cannot aid the Supreme Court in its review of this case on appeal.

That the Supreme Court has the privilege and the duty to "mak[e] an independent constitutional judgment on the facts of th[is] case"¹²³ is beyond question, for both constitutional and non-constitutional reasons. First, as a matter of constitutional law, the Supreme Court can review the facts "*de novo*"¹²⁴ in cases involving First-Amendment¹²⁵ and other [28] fundamental personal free-

¹²³ *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964).

¹²⁴ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 53-54 (1971) (opinion of Brennan, J.).

¹²⁵ *E.g., In re Primus*, 436 U.S. 412, 433-34 (1978), *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 53-54 (1971) (opinion of Brennan, J.); *Greenbelt Cooperative Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6, 11 (1970); *Bachellar v. Maryland*, 397 U.S. 564, 565-66 (1970); *Street v. New York*, 394 U.S. 576, 588-90 (1969); *Cox v. Louisiana*, 379 U.S. 536, 545 & n.8 (1965); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-92 (1964); *Edwards*

doms¹²⁶ impairment of which demands proof satisfying the clear-and-convincing-evidence standard. It can review the evidence independently in cases involving liberties guaranteed by the Equal Protection¹²⁷ and Due Process Clauses¹²⁸ of the Fourteenth Amendment. And it can reconsider the findings of lower courts in cases involving "judgments * * * regarding the whole nature of our Government".¹²⁹

The instant case comes within each of these categories. It is a case within the First Amendment¹³⁰ because Plaintiffs claim—and have proven—that: (i) "exclusive representation" under PELRA compels them to associate with

v. South Carolina, 372 U.S. 229, 234-35 (1963); Wood v. Georgia, 370 U.S. 375, 386-98 & nn.11-15 (1962); Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Feiner v. New York, 340 U.S. 315, 316 (opinion of the Court), 322 n.4 (Black J., dissenting) (1951); Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

¹²⁶ *E.g.*, Chaunt v. United States, 364 U.S. 350, 353 (1960); Knauer v. United States, 328 U.S. 654, 657-58 (1946); Baumgartner v. United States, 322 U.S. 665, 670-71 (1944); Schneiderman v. United States, 320 U.S. 118, 119-20 (1943); Gonzalez-Jasso v. Rogers, 264 F.2d 584, 586-87 (D.C. Cir. 1959).

¹²⁷ *E.g.*, Whitus v. Georgia, 385 U.S. 545, 549-50 (1967); Pierre v. Louisiana, 306 U.S. 354, 358 & nn.7-9 (1939); Cousins v. Chicago City Council, 466 F.2d 830, 837-38 & n.5 (7th Cir. 1972) (Fairchild, Cummings, & Stevens, JJ.).

¹²⁸ *E.g.*, Blackburn v. Alabama, 361 U.S. 199, 205 & n.5 (1960).

¹²⁹ Baumgartner v. United States, 322 U.S. 665, 670-71 (1944).

¹³⁰ For purposes of accurately distinguishing among various constitutional principles involved here, Plaintiffs will refer to the First Amendment separately from the Fourteenth. Of course, it is through the Due Process Clause of the Fourteenth Amendment that the requirements of the First apply to the States. *E.g.*, Malloy v. Hogan, 378 U.S. 1, 10-11 (1964); Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963).

MCCFA,¹³¹ accept its "sponsorship",¹³² and give it their allegiance,¹³³ as a condition of employment in the community colleges; (ii) MCCFA is integrated with MEA, NEA, IMPACE, and NEA-PAC in the UTP;¹³⁴ [29] (iii) the UTP is a political-action, or predominantly political organization indistinguishable (for purposes of constitutional law) from a political party or pressure-group;¹³⁵ and, therefore, (iv) PELRA impermissibly infringes Plaintiffs' freedoms of association, speech, and belief.¹³⁶ It is a case within the Equal Protection Clause of the Fourteenth Amendment because Plaintiffs claim—and have proven—that: (i) "exclusive representation" under PELRA provides MCCFA (and, through it, the UTP) with a special legal ability and opportunity to control or influence the determination of public policy as to terms and conditions of employment in the community colleges;¹³⁷ (ii) no other group in society possesses this special legal ability and opportunity to participate in public-policy determinations in the colleges;¹³⁸

¹³¹ PFF No. 259.

¹³² *Id.* No. 258.

¹³³ *Id.* No. 260.

¹³⁴ *Id.* Nos. 25-56.

¹³⁵ *Id.* Nos. 57-140.

¹³⁶ *Compare and contrast* Branti v. Finkel, — U.S. —, —, 100 S. Ct. 1287, 1293-95 (1980), *with* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 243-44 (Rehnquist, J., concurring), 256-57 (Powell, J., concurring in the judgment) (1977). *See* Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *De Paul L. Rev.* 293 (1978).

¹³⁷ PFF Nos. 221-29.

¹³⁸ Having been designated the "exclusive representative" in the community colleges, MCCFA alone exercises these extraordinary privileges, by definition. *See, e.g.,* Minn. Stat. §§ 179.65, subds. 4, 7; 179.66, subds. 2, 7-8; 179.67; 179.68, subd. 2(5-6, 9, 11); 179.69; 179.70.

and, therefore, (iii) PELRA impermissibly discriminates against Plaintiffs and all other citizens of the State of Minnesota.¹³⁹ It is a case within the Due Process [30] Clause of the Fourteenth amendment because Plaintiffs claim—and have proven—that: (i) “exclusive representation” under PELRA delegates to MCCFA (and, through it, to the UTP) the power to participate in the making of “economic laws” in the community colleges, binding on Plaintiffs and other persons;¹⁴⁰ (ii) “exclusive representation” under PELRA is the evolutionary development of, and is functionally and structurally equivalent to, the systems of “exclusive representation” that existed under the National Industrial Recovery Act and the Bituminous Coal Conservation Act;¹⁴¹ and, therefore, (iii) PELRA impermissibly delegates governmental power to private persons.¹⁴²

¹³⁹ See *City of Madison, Joint School Dist. No. 8 v. WERC*, 429 U.S. 167, 175-76 (1976); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 228 (opinion of Stewart, J.), 257-58 & n.12 (Powell, J., concurring in the judgment) (1977); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-92 (1978); *Winston-Salem/Forsyth County Unit, Educators' Ass'n v. Phillips*, 381 F. Supp. 644, 647-48 (M.D.N.C. 1974) (three-judge court). See Summers, “Public Sector Collective Bargaining Substantially Diminishes Democracy”, *Gov't Union Rev.*, Vol. 1, No. 1, at 5 (Winter 1980); E. Vieira, Jr., “To Break and Control the Violence of Faction”: *The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Arlington, Va.: Foundation for the Advancement of the Public Trust, 1980).

Operationally, this discrimination rests upon PELRA's compulsion of Plaintiffs and others to accept MCCFA as their “exclusive representative”. Therefore, it raises First-Amendment issues as well. See *ante*, notes 130-36 & accompanying text.

¹⁴⁰ PFF Nos. 201, 221-29.

¹⁴¹ PFF Nos. 177, 181-201.

¹⁴² See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936); A.L.A.

And it is a case involving "judgments * * * regarding the whole nature of our Government" because Plaintiffs claim—and have proven—that: (i) "exclusive representation" under PELRA effectively delegates to MCCFA (and, through it, to the UTP) a portion of the sover- [31] eighty of the state of Minnesota;¹⁴³ and, therefore, (ii) PELRA is self-evidently at odds with the first principle of constitutional government.¹⁴⁴

Second, even without regard to these peculiarly significant constitutional issues, the Supreme Court has broad power to review the evidence in cases where findings of fact result in the denial of federal rights, and those findings have no basis in the record.¹⁴⁵ It can review the evidence

Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 252-53 (1977) (Powell, J., concurring in the judgment). See Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", *Gov't Union Rev.*, Vol. 2, No. 1, at 56 (Winter 1981).

¹⁴³ PFF Nos. 179, 208-19.

¹⁴⁴ Compare J. Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government* (P. Laslett ed. 1960), §§ 168, 203-10, 215-16, 221,22, 225, 240-43; Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974); and R. S. Summers, *Collective Bargaining and Public Benefit Conferral: A Jurisprudential Critique* (Institute of Public Employment, N.Y. State School of Indus. and Labor Rel'ns, Monograph No. 7, November 1976), with *Winston-Salem/Forsyth County Unit, Educators' Ass'n v. Phillips*, 381 F. Supp. 644, 647-48 & n.4 (M.D.N.C. 1974) (three-judge court).

¹⁴⁵ E.g., *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 394 (1924); *Truax v. Corrigan*, 257 U.S. 312, 324-25 (1921); *Northern P. Ry. v. North Dakota*, 236 U.S. 585, 593 (1915); *Wood v. Chesborough*, 228 U.S. 672, 677-78 (1913); *Southern Pacific Co. v. Schuyler*, 227 U.S. 601, 611 (1913); *Creswill v. Knights of Phythias*, 225 U.S. 246, 261-62

where the record consists primarily of undisputed facts,¹⁴⁶ or where the ultimate [32] question is the application of law to such facts.¹⁴⁷ It can review the evidence where the lower-court's findings inextricably intermingle conclusions of law with purported factual statements.¹⁴⁸ And it can review the evidence where the findings derive mechanically

(1912). *Uf. Beyer v. Le Feure*, 186 U.S. 114, 119 (1902) (findings "wholly unwarranted by the testimony"); *The E. A. Packer*, 140 U.S. 360, 364-66 (1891) (findings "ambiguous, contradictory or incomplete").

¹⁴⁶ *E.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 & n.28 (1957). *See also, e.g.*, *United States ex rel. Adams v. General Motors Corp.*, 525 F.2d 161, 166 (6th Cir. 1975); *International Minerals & Chem. Corp. v. Moore*, 361 F.2d 349, 851 & n.1 (5th Cir. 1966); *Feldman v. Capitol Piece Dye Works, Inc.*, 293 F.2d 889, 891 (2d Cir. 1961); *Mayo v. Pioneer Bank & Trust Co.*, 297 F.2d 392, 395 (5th Cir. 1961); *McChesney v. Sims*, 267 F.2d 215, 217 (2d Cir. 1959); *Yunker v. Commissioner*, 256 F.2d 130, 133 (6th Cir. 1958); *Lamb v. ICC*, 259 F.2d 358, 360 (10th Cir. 1958); *Daniel v. First Nat'l Bank of Birmingham*, 228 F.2d 803, 804-05 (5th Cir. 1956); *Chicago, B. & Q.R.R. v. United States*, 221 F.2d 811, 812 (7th Cir. 1955); *American Eagle Fire Ins. Co. v. Eagle Star Ins. Co.*, 216 F.2d 176, 179 (9th Cir. 1954).

¹⁴⁷ *E.g.*, *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659 (1945). *See also, e.g.*, *Pearson v. Western Elec. Co.*, 542 F.2d 1150, 1151 (10th Cir. 1976); *Kiff v. Travelers Ins. Co.*, 402 F.2d 129, 131 (5th Cir. 1968).

¹⁴⁸ *E.g.*, *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935); *Fiske v. Kansas*, 274 U.S. 380, 385-87 (1927); *First Nat'l Bank of Hartford v. City of Hartford*, 273 U.S. 548, 552-53 (1927); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 394 (1924); *Northern P. Ry. v. North Dakota*, 236 U.S. 585, 593 (1915); *Wood v. Chesborough*, 228 U.S. 672, 677-78 (1913); *Southern Pacific Co. v. Schuyler*, 227 U.S. 601, 611 (1913); *Creswill v. Knights of Pythias*, 225 U.S. 246, 261-62 (1912); *Kansas City S. Ry. v. C. H. Albers Commission Co.*, 223 U.S. 573, 591-94 (1912).

from the proposals of one party, rather than from the trial-court's independent judgment.¹⁴⁹

The instant case comes within each of these categories, too. It is a case where Plaintiffs' federal rights¹⁵⁰ will be denied because of this Court's purported findings—wholly without basis in the record—that the UTP is not integrated¹⁵¹ and is not a predominantly political organization;¹⁵² and because of this Court's refusal to find—in complete disregard of overwhelming, undisputed evidence—that “exclusive representation” under PELRA licenses the UTP to make “economic laws” in the community colleges,¹⁵³ provides [33] the UTP with extraordinary influence over the course of public policy in the colleges,¹⁵⁴ and (overall) delegates to the UTP a portion of the sovereignty of the State of Minnesota.¹⁵⁵ It is a case where, for all practical purposes, the facts are undisputed,¹⁵⁶ and the primary task

¹⁴⁹ *E.g.*, *In re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970); *Roberts v. Ross*, 344 F.2d 747, 752-53 (3d Cir. 1965); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 737-39 (5th Cir. 1962); *Mesle v. Kea Steamship Corp.*, 260 F.2d 747, 750 (3d Cir. 1958); *The Severance*, 152 F.2d 916, 918 (4th Cir. 1945).

¹⁵⁰ Under 49 U.S.C. §§ 1983, 1985, and 1986 (1976).

¹⁵¹ *Contrast* CFF § II.A. with PFF Nos. 25-56.

¹⁵² *Contrast* CFF §§ II.B. and II.C. with PFF Nos. 57-140.

¹⁵³ PFF Nos. 177, 181-201.

¹⁵⁴ *Id.* Nos. 221-29, 263.

¹⁵⁵ *Id.* Nos. 208-19.

¹⁵⁶ For example: 1. There can be no dispute as to the UTP's integrated nature or political character, because Defendants called no expert-witnesses in organizational or political science. PFF Nos. 29, 103.

2. There can be no dispute concerning the nature of “exclusive representation” under PELRA, or its political effects, because expert-witnesses for both Plaintiffs and the Defendant State Of-

is to apply settled legal principles to those facts.¹⁵⁷ And it is a case where this Court's purported findings merely adopt the UTP's position, without impartial consideration of what evidence the record really contains.¹⁵⁸

[34] In short, the Supreme Court has the authority to review *all the evidence* in this case, in order to ascertain the extent to which this Court's findings are proper.¹⁵⁹

ficials in political economy, economics, political theory, and labor and industrial relations all agreed on these matters; and the UTP called no witness of its own. *Id.* Nos. 181, 216.

3. There can be no dispute concerning the incompetence of the UTP's various financial and accounting documents to show the extent of its involvement in political activism or "collective bargaining", because Plaintiffs alone produced an expert-witness in accountancy who so testified without refutation, and because all the non-expert witnesses who testified on behalf of the UTP concurred in the judgments of Plaintiffs' expert. *Id.* Nos. 141, 145-60. And,

4. There can be no dispute that the UTP failed to prove the (allegedly minimal) extent of its involvement in political activism through the testimony of various of its officials and staff-personnel, because this testimony either was inadmissible or false, or failed to satisfy the clear-and-convincing-evidence standard. *Id.* Nos. 161-67. *See post*, pp. 131-67.

¹⁵⁷ *E.g.*, Legal Appendix on Integration (legal principles of integration); Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 323-49 (1978) (legal principles of political action).

¹⁵⁸ *See* Table, *ante*, pp. 20a-20g.

¹⁵⁹ *E.g.*, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also, e.g.*, *Butler Paper Co. v. Business Forms, Ltd.*, 424 F.2d 247, 249 & n.2 (10th Cir. 1970); *Feder v. Martin Marietta Corp.*, 406 F.2d 260, 264 & n.2 (2d Cir. 1969); *Lentz v. Metropolitan Life Ins. Co.*, 428 F.2d 36, 39 (5th Cir. 1970); *Tanzer v. Huffines*, 408 F.2d 42, 45 & n.7 (3d Cir. 1969).

Unfortunately, these findings—unreflective as they are of the record's true content—can only hinder, not help, the Supreme Court in the performance of its appellate tasks. Indeed, this Court's findings can serve no function other than to leave the Supreme Court "with the definite and firm conviction that a mistake has been committed".¹⁶⁰ Amendment of these findings to conform to the law and the evidence is therefore essential.

II. THIS COURT'S FINDINGS REST ON IMPROPER LEGAL STANDARDS AS TO THE CONTROLLING NATURE OF UNCONTRADICTED EXPERT-TESTIMONY, THE PRINCIPLES OF ORGANIZATIONAL INTEGRATION AND POLITICAL ACTION IN PUBLIC-SECTOR EMPLOYMENT, AND THE REQUIREMENTS OF CLEAR AND CONVINCING EVIDENCE.

Under Rule 52, this Court had a duty to prepare findings informed by correct legal standards with respect, not only to substantive matters such as the law of organizational integration and political action, but also to evidentiary issues such as the burden of proof and the admissibility and weight of testimony and documents. This Court's findings do not reflect the application of such correct standards. Rather, they indicate that, on every material point, the Court adopted an erroneous legal principle as the basis for its decision. Therefore, the findings are clearly erroneous.

[35] Appellate courts characteristically give some consideration even to findings that have so little basis in fact as to be "clearly erroneous".¹⁶¹ However, where (as here) the

¹⁶⁰ *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

¹⁶¹ Findings can be "clearly erroneous" even when they have support in "substantial evidence". *E.g.*, *Jackson v. Hartford Accident & Indemnity Co.*, 422 F.2d 1272, 1275-78 (8th Cir. 1970) (Lay, J., concurring); *W.R.B. Corp. v. Geer*, 313 F.2d 750, 753 (5th Cir. 1963); *Hunter v. Dowd*, 198 F.2d 13, 17 (7th Cir. 1952); *Sanders*

findings not only fly in the face of the record on every material point, but also disregard or misapply controlling principles of law, they have no weight on appeal.¹⁶² This rule applies to such substantive issues as whether two or more organizational units are integrated,¹⁶³ as well as to such evidentiary matters as whether the trial-court rigorously applied the prevailing standard of proof,¹⁶⁴ or permitted its decision to turn on inadmissible evidence.¹⁶⁵

v. Leech, 158 F.2d 486, 487 & n.5 (5th Cir. 1946). Here, of course, this Court's ultimate findings, and many of its subsidiary findings as well, cannot claim even a scintilla of (let alone "substantial") evidence in their support. *See post*, pp. 167-225.

¹⁶² *E.g.*, United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963); United States v. Parke, Davis & Co., 362 U.S. 29, 43-44 (1960); United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948); Parke-Davis & Co. v. Stromsodt, 411 F.2d 1390, 1394 (8th Cir. 1969); Friedman v. Fordyce Concrete, Inc., 362 F.2d 386, 387-88 (8th Cir. 1966); Municipal Bond Corp. v. Commissioner, 341 F.2d 683, 686 (8th Cir. 1965) (Van Oosterhout, Blackmun, & Mehafty, JJ.); Minneapolis, St. P. & S. St. M.R.R. v. Metal-Matic, Inc., 323 F.2d 903, 912 (8th Cir. 1963) (Vogel, Blackmun, & Ridge, JJ.); Manning v. M/V "Sea Road", 417 F.2d 603, 607 (5th Cir. 1969); MacMullen v. South Carolina Elec. & Gas Co., 312 F.2d 662, 670 (4th Cir. 1963).

¹⁶³ *Cf.* United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963); United States v. Parke, Davis & Co., 362 U.S. 29, 43-44 (1960); United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948).

¹⁶⁴ *Clear-and-convincing-evidence standard*: Knaur v. United States, 328 U.S. 654, 657-58 (1946); Baumgartner v. United States, 322 U.S. 665, 670-71 (1944); Schneiderman v. United States, 320 U.S. 118, 129-30 (1943); Gonzalez-Jasso v. Rogers, 264 F.2d 584, 586-87 (D.C. Cir. 1959). *Clear-proof standard*: Lewis v. Pennington, 400 F.2d 806, 816 (6th Cir. 1968).

¹⁶⁵ *E.g.*, Smallfield v. Home Ins. Co. of New York, 244 F.2d 337, 341 (9th Cir. 1957).

[36] Here, this Court's findings suffer from each of these legal demerits. First, the findings give essentially no weight to the uncontradicted testimony of the expert-witnesses Plaintiffs and the Defendant State Officials called, in violation of the rules of evidence and the least-restrictive-alternative rule of First-Amendment jurisprudence. Second, this Court's findings rest on no cognizable legal principle of organizational integration, and on an erroneous legal theory as to what constitutes a predominantly political organization in public-sector employment. And third, this Court's findings rely on inadmissible or otherwise uncreditable testimony and documents the UTP proffered at trial, while ignoring contradictory stipulations into which the UTP entered, in violation of the clear-and-convincing-evidence standard.

A. This Court's findings erroneously fail to give controlling weight to the uncontradicted expert-testimony.

Plaintiffs, the Defendant State Officials, or both adduced testimony from expert-witnesses in the fields of organizational science,¹⁶⁶ political science,¹⁶⁷ political economy,¹⁶⁸ economics,¹⁶⁹ political theory,¹⁷⁰ labor and industrial relations,¹⁷¹ and accounting.¹⁷² The UTP offered no expert-

¹⁶⁶ PFF Nos. 29-42 (Plaintiffs' witnesses).

¹⁶⁷ *Id.* Nos. 103-20 (Plaintiffs' witness).

¹⁶⁸ *Id.* Nos. 181-85, 190, 192, 195, 197-207, 263 (Plaintiffs' witness).

¹⁶⁹ *Id.* Nos. 181-85, 187, 189, 191, 193, 195-96, 205, 213, 216 (Plaintiffs' witness).

¹⁷⁰ *Id.* Nos. 173-74, 216-19, 229 (Plaintiffs' witness).

¹⁷¹ *Id.* Nos. 181-86, 188, 194, 208-12 (Defendant State Officials' Witness).

¹⁷² *Id.* Nos. 145-54, 158-60 (Plaintiffs' witness).

[37] testimony on any subject. Thus, *all* of the *expert*-testimony was either *uncontradicted*, *mutually consistent*, or both. The UTP purported indirectly to challenge only the testimony in organizational science through questioning certain admittedly ignorant lay-witnesses.¹⁷³ Except for one cryptic remark,¹⁷⁴ however, this Court's findings completely disregard all of the testimony *of the expert-witnesses*, and instead adopt the unsubstantiated arguments *of the UTP's attorneys* on the issues of integration and political action,¹⁷⁵ saying *nothing* on any other subject of expert-analysis. This result is erroneous simply as a matter of the rules of evidence generally applicable in all cases, and contravenes the least-restrictive-alternative test specially applicable in this First-Amendment litigation.

1. General rules of evidence require this Court to give controlling weight to the uncontradicted testimony of the parties' expert-witnesses.

The general rule is that, "[i]f * * * the evidence—expert or non-expert—is all one way, there is no room for a contrary finding".¹⁷⁶ Moreover, where the subject-matter of

¹⁷³ *Id.* at 12-13 n.33.

¹⁷⁴ CFF § II.A.6.

¹⁷⁵ *See post*, pp. 49-51, 218-19.

¹⁷⁶ *Stafos v. Missouri P.R.R.*, 367 F.2d 314, 317 (10th Cir. 1966). *Accord, e.g.*, *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213-16 (1931); *Quock Ting v. United States*, 140 U.S. 417, 420 (1891); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893, 899-900 (8th Cir. 1946); *Lewis & Taylor, Inc. v. Commissioner*, 447 F.2d 1074, 1077 (9th Cir. 1971); *C. H. Codding & Sons v. Armour and Co.*, 404 F.2d 1, 6 (10th Cir. 1968); *Chicago, R.I. & P. Ry. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968); *Alvary v. United States*, 302 F.2d 790, 794 (2d Cir. 1962); *Nicholas v. Davis*, 204 F.2d 200, 202 (10th Cir. 1953); *Wooster Rubber Co. v. Com-*

testimony [38] is beyond the comprehension or experience of laymen, the trier of fact cannot disregard uncontradicted expert-testimony and substitute therefor its own, uneducated speculations as to the facts.¹⁷⁷ Here, though, this

missioner, 189 F.2d 878, 887 (6th Cir. 1951); *J.H. Robinson Truck Lines v. Commissioner*, 183 F.2d 739, 740 (5th Cir. 1950); *Mayson Mfg. Co. v. Commissioner*, 178 F.2d 115, 121-22 (6th Cir. 1949); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452, 455-56 (6th Cir. 1949).

¹⁷⁷ *E.g.*, *Cullers v. Commissioner*, 237 F.2d 611, 616 (8th Cir. 1956) (fact-finder without "knowledge and experience relative to the subject matter" may not disregard expert-testimony); *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 727-29 (5th Cir. 1979) (layman's "self-serving testimony" does not "qualify as substantial evidence" in face of "uncontradicted expert testimony", where layman's "[e]vidence manifestly at variance with" scientific facts); *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1971) ("where the answer is one requiring evidence from a professional and that evidence is * * * not contradicted * * *, the fact should be deemed established"); *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193-94 (5th Cir. 1970) ("trier of fact * * * not * * * at liberty to disregard * * * uncontradicted testimony of an expert witness, * * * where * * * testimony bears on technical questions * * * beyond the competence of lay determination"); *United States v. Weir*, 281 F.2d 850, 852-55 (5th Cir. 1960) ("testimony of a layman * * * does not rise to the dignity of substantial evidence" where fact "can be ascertained only by persons trained in * * * science"); *Loesch v. Green Constr. Co. v. Commissioner*, 211 F.2d 210, 211-12 (6th Cir. 1954); *United States v. Hoxsey Cancer Clinic*, 198 F.2d 273, 280-81 (5th Cir. 1952); *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942) (trier of fact should accept expert-testimony "in a matter in which [it] had no knowledge or experience upon which it could exercise an independent judgment"); *Farley v. Heininger*, 105 F.2d 79, 83-84 (D.C. Cir. 1939) (opinions of laymen cannot deprive expert-opinions of substance); *Planters'*

Court chooses to disregard facts the record establishes without the slightest hint of contro- [39] versy, and purports to find "facts" on technical subjects that the uncontradicted expert-testimony refuted in every particular.

- a. This Court should have adopted the uncontradicted conclusions of the expert-witnesses for Plaintiffs and the Defendant State Officials concerning the structure and political effects of "exclusive representation" under Minnesota's Public Employment Labor Relations Act.*

First, with respect to the issue of the structure, operation, and evolution of "exclusive representation" under PELRA, and its effects on political equality and sovereignty in Minnesota, the only evidence in the record came from the expert-testimony that Plaintiffs and the Defendant State Officials adduced.¹⁷⁸ Self-evidently, the subject-matter is complex and technical, beyond the common knowledge, experience, and understanding of laymen.¹⁷⁹ [40] The

Operating Co. v. Commissioner, 55 F.2d 583, 585-86 (8th Cir. 1932); Pittsburgh Hotels Co. v. Commissioner, 43 F.2d 345, 347 (3d Cir. 1930); Boggs & Buhl, Inc. v. Commissioner, 34 F.2d 859, 860-61 (3d Cir. 1929); Watjen v. Louisville Tobacco Warehouse Co., 29 F.2d 801, 802-03 (6th Cir. 1928); Hill v. Fleming, 169 F. Supp. 249, 245 (W.D. Pa. 1958) (decision adverse to uncontradicted expert-testimony "should be set aside as based on 'suspicion' and 'speculation'").

¹⁷⁸ PFF Nos. 173-75, 177-219, 229.

¹⁷⁹ On the importance of this factor, see, e.g., Cullers v. Commissioner, 237 F.2d 611, 616 (8th Cir. 1956); Franklin Supply Co. v. Tolman, 454 F.2d 1059, 1071 (9th Cir. 1971); Webster v. Off-shore Food Service, Inc., 434 F.2d 1191, 1193-94 (5th Cir. 1970); Stafos v. Missouri P.R.R., 367 F.2d 314, 317 (10th Cir. 1966); Amador Beltran v. United States, 302 F.2d 48, 51-52 (5th Cir.

expert-witnesses' testimony was uncontradicted;¹⁸⁰ inher-

Cir. 1962); *United States v. Weir*, 281 F.2d 850, 852-55 (5th Cir. 1960); *Loesch & Green Constr. Co. v. Commissioner*, 211 F.2d 210, 211-12 (6th Cir. 1954); *United States v. Hoxsey Cancer Clinic*, 198 F.2d 273, 280-81 (5th Cir. 1952); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452, 455-56 (6th Cir. 1949); *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942); *Farley v. Heininger*, 105 F.2d 79, 83-84 (D.C. Cir. 1939); *Planters' Operating Co. v. Commissioner*, 55 F.2d 583, 585-86 (8th Cir. 1932); *Pittsburgh Hotels Co. v. Commissioner*, 43 F.2d 345, 347 (3d Cir. 1930); *Boggs & Buhl, Inc. v. Commissioner*, 34 F.2d 859, 860-61 (3d Cir. 1929); *Watjen v. Louisville Tobacco Warehouse Co.*, 29 F.2d 801, 802-03 (6th Cir. 1928).

¹⁸⁰ On the importance of this factor, *see, e.g.*, *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213-16 (1931); *Quock Ting v. United States*, 140 U.S. 417, 420 (1891); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893, 899-900 (8th Cir. 1946); *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 727-29 (5th Cir. 1979); *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1971); *Webster v. Offshore Food Service, Inc.* 434 F.2d 1191, 1193-94 (5th Cir. 1970); *C.H. Coddling & Sons v. Armour and Co.*, 404 F.2d 1, 6 (10th Cir. 1969); *Sternberger v. United States*, 401 F.2d 1012, 1016-17 (Ct. Cl. 1968); *Stafos v. Missouri P.R.R.*, 367 F.2d 314, 317 (10th Cir. 1966); *Amador Beltran v. United States*, 302 F.2d 48, 51-52 (5th Cir. 1962); *Rapid Transit Co. v. United States*, 295 F.2d 465, 466-67 (10th Cir. 1961); *Loesch & Green Constr. Co. v. Commissioner*, 211 F.2d 210, 211-12 (6th Cir. 1954); *Nicholas v. Davis*, 204 F.2d 200, 202 (10th Cir. 1953); *United States v. Hoxsey Cancer Clinic*, 198 F.2d 273, 280-81 (5th Cir. 1952); *Wooster Rubber Co. v. Commissioner*, 189 F.2d 878, 887 (6th Cir. 1951); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452, 455-56 (6th Cir. 1949); *Pittsburgh Hotels Co. v. Commissioner*, 43 F.2d 345, 347 (3d Cir. 1930); *Watjen v. Louisville Tobacco Warehouse Co.*, 29 F.2d 801, 802-03 (6th Cir. 1928); *Hill v. Fleming*, 169 F. Supp. 240, 245 (W.D. Pa. 1958).

ently believable;¹⁸¹ unequivocal;¹⁸² unchallenged as to accuracy;¹⁸³ [41] free from omissions, imprecision, or demonstrated errors;¹⁸⁴ and unshaken on cross-examination.¹⁸⁵

¹⁸¹ On the importance of this factor, *see, e.g.*, *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213-16 (1931); *Quock Ting v. United States*, 140 U.S. 417, 420 (1891); *Railway Mail Ass'n v. Chamberlain*, 14 F.2d 206, 207 (8th Cir. 1945); *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1971); *Lewis & Taylor, Inc. v. Commissioner*, 447 F.2d 1074, 1077 (9th Cir. 1971); *Chicago, R.I. & P. Ry. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968); *Sternberger v. United States*, 401 F.2d 1012, 1016-17 (Ct. Cl. 1968); *Sabbagha v. Celebrezze*, 345 F.2d 509, 511-12 (4th Cir. 1965); *Rapid Transit Co. v. United States*, 294 F.2d 465, 466-67 (10th Cir. 1961); *Lau Ah Yew v. Dulles*, 257 F.2d 744, 746-47 (9th Cir. 1958); *Ansley v. Commissioner*, 217 F.2d 252, 257 (3d Cir. 1954); *Nicholas v. Davis*, 204 F.2d 200, 202 (10th Cir. 1953); *Rosenberg v. Baum*, 153 F.2d 10, 13-14 (10th Cir. 1946).

¹⁸² On the importance of this factor, *see, e.g.*, *Skar v. City of Lincoln, Nebraska*, 599 F.2d 253, 259-60 (8th Cir. 1979); *Rawdon v. Stanley*, 455 F.2d 482, 484 (10th Cir. 1972); *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193-94 (5th Cir. 1970); *Amador Beltran v. United States*, 302 F.2d 48, 51-52 (5th Cir. 1962).

¹⁸³ On the importance of this factor, *see, e.g.*, *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1971); *South, Inc. v. Moran Towing & Transportation Co., Inc.*, 360 F.2d 1003, 1006 (2d Cir. 1966).

¹⁸⁴ On the importance of this factor, *see, e.g.*, *Quock Ting v. United States*, 140 U.S. 417, 420-21 (1891); *Sternberger v. United States*, 401 F.2d 1012, 1016-17 (Ct. Cl. 1968); *Lau Ah Yew v. Dulles*, 257 F.2d 744, 746-47 (9th Cir. 1958).

¹⁸⁵ On the importance of this factor, *see, e.g.*, *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213-16 (1931); *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193-94 (5th Cir. 1970); *Chicago, R.I. & P. Ry. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968); *Rapid Transit Co. v. United States*, 295 F.2d 465, 466-67 (10th

The witnesses themselves were unimpeached¹⁸⁶ as to their qualifications,¹⁸⁷ [42] competency,¹⁸⁸ integrity,¹⁸⁹ or credi-

Cir. 1961); *Nicholas v. Davis*, 204 F.2d 200, 202 (10th Cir. 1953); *Koshland's Estate v. Commissioner*, 177 F.2d 851, 852 (9th Cir. 1949).

¹⁸⁶ On this importance of this factor, *see, e.g.*, *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213-16 (1931); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893, 899-900 (8th Cir. 1946); *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193-94 (5th Cir. 1970); *C.H. Codding & Sons v. Armour and Co.*, 404 F.2d 1, 6 (10th Cir. 1968); *Chicago, R.I. & P. Ry. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968); *Cundick v. Broadbent*, 383 F.2d 157, 161-63 (10th Cir. 1967); *Stafos v. Missouri P.R.R.*, 367 F.2d 314, 316 (10th Cir. 1966); *Loesch & Green Constr. Co. v. Commissioner*, 211 F.2d 210, 211-12 (6th Cir. 1954); *Nicholas v. Davis*, 204 F.2d 200, 202 (10th Cir. 1953); *Wooster Rubber Co. v. Commissioner*, 189 F.2d 878, 887 (6th Cir. 1951); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 454, 455-56 (6th Cir. 1949); *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942).

¹⁸⁷ On the importance of this factor, *see, e.g.*, *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193-94 (5th Cir. 1970); *United States v. Weir*, 281 F.2d 850, 852-55 (5th Cir. 1960); *Loesch & Green Constr. Co. v. Commissioner*, 211 F.2d 210, 211-12 (6th Cir. 1954); *Wooster Rubber Co. v. Commissioner*, 189 F.2d 878, 887 (6th Cir. 1951); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452, 455-56 (6th Cir. 1949); *Planters' Operating Co. v. Commissioner*, 55 F.2d 583, 585-86 (8th Cir. 1932).

¹⁸⁸ On the importance of this factor, *see, e.g.*, *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942); *Watjen v. Louisville Tobacco Warehouse Co.*, 29 F.2d 801, 802-03 (6th Cir. 1928).

¹⁸⁹ On the importance of this factor, *see, e.g.*, *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942); *Watjen v. Louisville Tobacco Warehouse Co.*, 29 F.2d 801, 802-03 (6th Cir. 1928).

bility;¹⁹⁰ or by their (lack of) personal interest in the proceedings,¹⁹¹ or demeanor.¹⁹² And the failure of the UTP to call its own experts in rebuttal justifies an adverse inference against that organization on the subject-matter.¹⁹³ Yet, amazingly, this [43] Court says *nothing* in its findings about these experts' testimony, *or even about the subjects of their testimony!* This refusal to address the issues, and to adopt the experts' mutually consistent and re-inforcing

¹⁹⁰ On the importance of this factor, *see, e.g.*, *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213-16 (1931); *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1971); *Webster v. Off-shore Food Service, Inc.*, 434 F.2d 1191, 1193-94 (5th Cir. 1970); *Sternberger v. United States*, 401 F.2d 1012, 1016-17 (Ct. Cl. 1968); *Cundick v. Broadbent*, 383 F.2d 157, 161-63 (10th Cir. 1953); *Mayson Mfg. Co. v. Commissioner*, 178 F.2d 115, 121-22 (6th Cir. 1949); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452, 455-56 (6th Cir. 1949); *Rosenberg v. Baum*, 153 F.2d 19, 13-14 (10th Cir. 1946); *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942); *Watjen v. Louisville Tobacco Warehouse Co.*, 29 F.2d 801, 802-03 (6th Cir. 1928).

¹⁹¹ On the importance of this factor, *see, e.g.*, *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 626-28 (1944); *Railway Mail Ass'n v. Chamberlain*, 148 F.2d 206, 208 (8th Cir. 1945); *Lau Ah Yew v. Dulles*, 257 F.2d 744, 746-47 (9th Cir. 1958); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452, 455-56 (6th Cir. 1949); *Rosenberg v. Baum*, 153 F.2d 10, 13-14 (10th Cir. 1946); *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942).

¹⁹² On the importance of this factor, *see, e.g.*, *Quock Ting v. United States*, 140 U.S. 417, 420-21 (1891); *Northwest Airlines v. Rowe*, 226 F.2d 365, 371 (8th Cir. 1955); *Railway Mail Ass'n v. Chamberlin*, 148 F.2d 206, 207 (8th Cir. 1945); *Lewis & Taylor, Inc. v. Commissioner*, 447 F.2d 1074 (9th Cir. 1971).

¹⁹³ On the importance of this factor, *see, e.g.*, *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213-16 (1931); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452, 455-56 (6th Cir. 1949).

judgments, constitutes clear error. For, under these circumstances, this Court has no power to disregard the experts' testimony¹⁹⁴—rather, it should have accepted that testimony as true, and formulated findings of fact thereupon.¹⁹⁵

¹⁹⁴ See, e.g., *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213-16 (1931); *Cullers v. Commissioner*, 273 F.2d 611, 616 (8th Cir. 1956); *Rawdon v. Stanley*, 455 F.2d 482, 484 (10th Cir. 1972); *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193-94 (5th Cir. 1970); *Cundick v. Broadbent*, 383 F.2d 157, 161-63 (10th Cir. 1967); *Alvary v. United States*, 302 F.2d 790, 794 (2d Cir. 1962); *Rapid Transit Co. v. United States*, 295 F.2d 465, 466-67 (10th Cir. 1961); *Loesch & Green Constr. Co. v. Commissioner*, 211 F.2d 210, 211-12 (6th Cir. 1954); *Nicholas v. Davis*, 204 F.2d 200, 202 (10th Cir. 1953); *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452, 455-56 (6th Cir. 1949); *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 F.2d 712, 714-15 (6th Cir. 1942); *Planters' Operating Co. v. Commissioner*, 55 F.2d 583, 585-86 (8th Cir. 1932); *Pittsburgh Hotels Co. v. Commissioner*, 43 F.2d 345, 347 (3d Cir. 1930); *Boggs & Buhl, Inc. v. Commissioner*, 34 F.2d 859, 860-61 (3d Cir. 1929); *Watjen v. Louisville Tobacco Warehouse Co.*, 29 F.2d 801, 802-03 (6th Cir. 1928).

¹⁹⁵ See, e.g., *Quock Ting v. United States*, 140 U.S. 417, 420-21 (1891); *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1971); *Lewis & Taylor, Inc. v. Commissioner*, 447 F.2d 1074, 1077 (9th Cir. 1971); *C.H. Coddling & Sons v. Armour and Co.*, 404 F.2d 1, 6 (10th Cir. 1968); *Chicago, R.I. & P. Ry. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968); *Stafos v. Missouri P.R.R.*, 367 F.2d 314, 317 (10th Cir. 1966); *Ansley v. Commissioner*, 217 F.2d 252, 257 (2d Cir. 1954); *Wooster Rubber Co. v. Commissioner*, 189 F.2d 878, 887 (6th Cir. 1951); *Mayson Mfg. Co. v. Commissioner*, 178 F.2d 115, 121-22 (6th Cir. 1949); *Rosenberg v. Baum*, 153 F.2d 10, 13-14 (10th Cir. 1946); *Hill v. Fleming*, 169 F. Supp. 240, 245 (W.D. Pa. 1958).

[44] *b. This Court should have adopted the uncontradicted conclusion of Plaintiffs' expert-witnesses in organizational science that the United Teaching Profession is an integrated organization.*

Second, with respect to the issue of the UTP's integrated nature, the only evidence in the record came from three sources: namely, (i) the testimony of Plaintiffs' expert-witnesses in organizational science;¹⁹⁶ (ii) admissions of integration in stipulations, UTP documents, and the testimony of numerous of its own officials and staff-personnel at trial;¹⁹⁷ and (iii) scattered statements of UTP lay-witnesses who ignorantly described MCCFA, MEA, NEA, IMPACE, and NEA-PAC as "separate" and "independent" organizations.¹⁹⁸ Yet, once again, the Court says essentially *nothing* about the experts' testimony,¹⁹⁹ purporting instead to find that the UTP is not integrated on the basis of a set of carefully selected subsidiary "facts".²⁰⁰ Of course, properly analyzed, even these "facts" demonstrate integration in a clear and convincing fashion.²⁰¹ But this Court should have found the UTP integrated without further analyses of these, or other, facts.

[45] The subject-matter of organizational integration is beyond the common knowledge, experience, and understanding of laymen, as Plaintiffs' expert-witness, Professor Schneier, testified without contradiction.²⁰² None the less,

¹⁹⁶ PFF Nos. 29-42.

¹⁹⁷ PFF Nos. 43-56.

¹⁹⁸ See PFF at 12-13 n.33, analyzing this testimony.

¹⁹⁹ CFF at 7: "we have considered the testimony of Professors Schneier and Morgan".

²⁰⁰ *Id.* § II.A.

²⁰¹ *Post*, pp. 168-93.

²⁰² PFF No. 31.

the UTP called no expert-witness of its own in organizational science,²⁰³ even though it had known of the substance of Professor Schneier's testimony for nearly *two years* prior to the trial.²⁰⁴ This alone justifies a telling adverse inference against the UTP.²⁰⁵ In addition, the testimony of Plaintiffs' experts was inherently believable, unequivocal, unchallenged as to scientific accuracy, without demonstrated errors, and unshaken on cross-examination.²⁰⁶ Indeed, Professor Schneier testified that "certainly beyond any reasonable doubt * * * [i.e., MCCFA, MEA, NEA, IMPACE, and NEA-PAC] function as one organization",²⁰⁷ and that he "saw nothing [in the record] to indicate that these units were not integrated".²⁰⁸ Moreover, no one attempted to impeach [46] Plaintiffs' experts in organizational science by questioning their qualifications, competency, integrity, credibility, or personal interest in the pro-

²⁰³ *Id.* No. 29.

²⁰⁴ Plaintiffs themselves deposed Professor Schneier on 28-29 December 1978, in order to preserve his testimony.

²⁰⁵ *Ante*, note 193 & accompanying text.

²⁰⁶ *See ante*, notes 181-85 & accompanying text. With respect to cross-examination particularly, *see* PFF No. 41.

²⁰⁷ PFF No. 37. Professor Schneier's testimony, therefore, went far beyond what is necessary to establish integration. *See, e.g.*, Chicago, R.I. & P.R.R. v. Melcher, 333 F.2d 996, 1000 (8th Cir. 1964) ("an [expert]-opinion is not required to be expressed as one of convictional certainty in general, but only as one of persuaded probability on the elements of the particular situation").

²⁰⁸ PFF No. 40. Professor Schneier, or course, did not use merely a process of elimination to conclude that the UTP is integrated, but performed his analysis in a positive fashion. *Id.* Nos. 34-37. However, a process of elimination is a perfectly satisfactory methodology for supporting an expert's judgment. *See, e.g.*, Giehner v. Antonio Troiano Tile & Marble Co., 410 F.2d 328, 245-47 (D.C. Cir. 1969).

ceedings, or by suggesting that their demeanor impugned their trustworthiness.²⁰⁹ Furthermore, the record abounds with examples of testimony from the UTP's own officials and staff-personnel, and statements in the UTP's own documents that substantiate, point for point, the conclusions of Plaintiffs' experts,²¹⁰ *including explicit stipulations that MCCFA, MEA, and NEA are integrated in the UTP.*²¹¹

²⁰⁹ See *ante*, notes 186-92 & accompanying text.

²¹⁰ *E.g.*, Plaintiffs' Trial Exhibits (PTE) Nos. 2-6, 28-29, 34, 63, 102, *analyzed in* Professor Schneier's testimony, PFF at 20 n.55. See PFF at 16 nn.42-43, Nos. 43-56. Particularly illuminating is the trial-testimony of MEA's Executive Director:

Q. * * * which * * * do you think is [*sic*, "has" is meant] the most practical consequence to serving the special interests of teachers, the local [affiliate of MEA], the State [MEA], the National [NEA], or the UNISERV?

A. You can't take one.

Q. You think they are all more or less interdependent, self-supporting?

A. They are one. You can't separate one.

Quoted in PFF at 18-19 n.49. A statement of the integration of MCCFA ("local"), MEA ("State"), and NEA ("National") in the UTP more concise than "[t]hey are one" would be hard to imagine.

²¹¹ Plaintiffs' Revised Stipulations (PRS) Nos.

405. The United Teaching Profession includes local-level affiliates throughout the United States (such as MCCFA), state-level affiliates in each State (such as MEA), and the national-level affiliate in Washington, D.C. (NEA).

406. NEA considers its local-level affiliates, such as MCCFA, integral parts of the United Teaching Profession.

407. As a local-level affiliate of NEA and MEA, MCCFA considers itself an integral part of the United Teaching Profession.

Under these circumstances, this Court had no power merely to "consider" the testimony of Plaintiffs' experts, [47] while in effect disregarding it, but instead should have

408. NEA considers its state-level affiliates, such as MEA, integral parts of the United Teaching Profession.

409. As a state-level affiliate of NEA, MEA considers itself an integral part of the United Teaching Profession.

415. As used by NEA, the term "United Teaching Profession" denotes the relationship of NEA with its state- and local-level affiliates, such as MEA and MCCFA, respectively.

416. As used by MEA, the term "United Teaching Profession" denotes the relationships of MEA with NEA at the national level and with such local-level affiliates as MCCFA.

417. As used by MCCFA, the term "United Teaching Profession" denotes the relationship of MCCFA with MEA and NEA.

427. NEA has registered, with the United States Patent Office, the term "United Teaching Profession", for the purpose of indicating membership in NEA and its affiliated organizations.

Apparently, this Court overlooked these *particular, explicit* admissions of integration in its "carefu[l] revie[w of] * * * the stipulations of fact." CFF at 1. None the less, these stipulations exist, binding the UTP. *See, e.g.,* United States v. Sommers, 351 F.2d 354, 357 (10th Cir. 11965); General Constr. Co. v. Hering Realty Co., 201 F. Supp. 487, 492-93 (E.D.S.C. 1952). Thus, even pretermittting the effect of the testimony of Plaintiffs' expert-witnesses in organizational science, this Court's purported finding "that MCCFA, MEA and NEA are not a single integrated organization" collapses. CFF at 8. And, in light of the Court's concession "that IMPACE and NEA-PAC are separate political action committees of MEA and NEA, respectively", it follows that *all* of these units are, in fact, integrated.

adopted their judgment as the ultimate fact on the question of integration.²¹²

[48] Plaintiffs need not again catalogue and analyze the massive admissions of integration in stipulations, UTP documents, and the testimony of numerous of the UTP's own officials and staff-personnel at trial.²¹³ Each of these admissions satisfies one or more of the legal tests for integration,²¹⁴ which tests Plaintiffs' expert in organizational science verified as congruent with the criteria of that science.²¹⁵

²¹² See *ante*, notes 194-95 & accompanying text.

²¹³ See PFF Nos. 43-56.

²¹⁴ See LAI *passim*, in Appendix hereto.

²¹⁵ Affidavit of Dr. Craig Eric Schneier (16 November 1979), at 8 (footnote omitted):

(15a) Exhibit A attached hereto contains a Legal Appendix on Integration prepared by Plaintiffs' counsel, which I have examined to ascertain its relation to the present organizational-science analysis on the question of integration.

In my professional opinion, the legal principles set out in the document fully support both my analysis and conclusions. These legal principles and descriptions of activities and relationships culled from previous cases are tantamount to those criteria I developed from the organizational-science literature (*e.g.*, information exchange). Additional criteria cited in the legal appendix—such as like policies across sub-entities, organic documents of one sub-entity indicating power over another sub-entity, one entity acting as an “arm” of another, overlapping members or leaders across sub-entities, and shared physical facilities—directly parallel criteria I employed in the organizational-science analysis. • • •

Plaintiffs filed this affidavit with their Report to the Court on the Status of the Case as of the Pre-Trial Hearing of 19 November 1979 (19 November 1979).

Which leaves as the sole "evidence" purporting to question the experts' conclusions the more-or-less random statements of various of the UTP's officials and staff-personnel on the alleged "separateness" of its component-units. But this "evidence" is entitled to *no* weight, because: (i) each of [49] these lay-witnesses admitted that he knew nothing about organizational science; and (ii) several even conceded they knew nothing about how various UTP units actually interact.²¹⁶ The law on this matter is clear: self-serving testimony of uninformed laymen,²¹⁷ particularly when given in conclusory form and when the assertions therein find no support in the underlying facts,²¹⁸ does not constitute substantial evidence,²¹⁹ and cannot contradict expert-testimony.²²⁰ This being so, the record contains no factual support whatsoever for the Court's conclusion that MCCFA, MEA, NEA, IMPACE, and NEA-PAC are not integrated—and that conclusion, therefore, is clearly erroneous.²²¹

What the record does show, however, is that the Court's findings, rather than "represent[ing] our independent

²¹⁶ PFF at 13 n.33.

²¹⁷ *See, e.g.,* Ralston Purina Co. v. Hobson, 554 F.2d 725, 727-29 (5th Cir. 1977).

²¹⁸ *Cf., e.g.,* Sabbagha v. Celebrezze, 345 F.2d 509, 511-12 (4th Cir. 1965).

²¹⁹ *See, e.g.,* United States v. Weir, 281 F.2d 850, 852-55 (5th Cir. 1960).

²²⁰ *See, e.g.,* Farley v. Heininger, 105 F.2d 79, 83-84 (D.C. Cir. 1939).

²²¹ *See, e.g.,* Hill v. Fleming, 169 F. Supp. 240, 245 (W.D. Pa. 1958) ("when [expert-opinions] are not repudiated in any respect by substantial evidence to the contrary, an adverse decision on these ultimate facts should be set aside as based on 'suspicion' and 'speculation'")

judgment based upon * * * review",²²² merely adopt the unsubstantiated [50] arguments of the UTP's attorneys as the ultimate "facts" on the issue of integration. Indeed, at the trial, the UTP's counsel first conceded that he is "not an organizational scientist"—but then boldly announced that his uninformed layman's "approach as to how the organizations [i.e., MCCFA, MEA, NEA, IMPACE, and NEA-PAC] function and [Professor Schneier's] approach as to how the organizations function are going to be decided by * * * the Court as to whether or not there are separate levels or whether there is one entity".²²³ And the Court has fulfilled this prediction by rejecting the uncontradicted testimony of Plaintiffs' expert-witnesses as given under oath in favor of the unproven notions of the UTP's counsel as argued in briefs!

Arguments of counsel, though, are not evidence, especially where First-Amendment freedoms are at stake.²²⁴ Lawyers' contentions, unsupported by proof, cannot overcome uncontradicted testimony,²²⁵ particularly testimony from expert-witnesses in a field in which the lawyer is a self-confessed ignoramus. Indeed, even where an attorney actually takes the stand on behalf of his client, he "does so at a very great detriment to the credibility of his testimony".²²⁶ And even where that lawyer has expert-knowledge, his testimony cannot serve as the trial-court's primary basis for rebutting a statutory [51] presumption,²²⁷ let

²²² CFF at 1.

²²³ PFF at 12 n.33.

²²⁴ *E.g.*, *In re Primus*, 436 U.S. 412, 434 n.27 (1978); *Bollinger v. Rheem Mfg. Co.*, 381 F.2d 182, 185 n.1 (10th Cir. 1967).

²²⁵ *E.g.*, *Livergood v. S.J. Groves and Sons Co.*, 361 F.2d 269, 274 (3d Cir. 1966).

²²⁶ *Lau Ah Yew v. Dulles*, 257 F.2d 744, 746-47 (9th Cir. 1958).

²²⁷ *Universal Athletic Sales Co. v. American Gym, Recreational and Athletic Equipment Corp., Inc.*, 546 F.2d 530, 536-40 (3d Cir. 1976).

alone for rejecting out of hand the contrary judgment of a disinterested expert that the UTP is integrated "beyond a reasonable doubt".²²⁸

In short, simply on the basis of the general rules of evidence, this Court must set aside its purported finding that the UTP is not integrated, and enter a new ultimate finding to the contrary.

c. This Court should have adopted the uncontradicted conclusion of Plaintiffs' expert-witness in political science that the United Teaching Profession is a predominantly political organization.

Third, with respect to the issue of the UTP's predominantly political character, the only evidence in the record came from four sources: namely, (i) the testimony of Plaintiffs' expert-witness in political science;²²⁹ (ii) admissions of the UTP's essential and substantial involvement in every major form of political activism,²³⁰ contained in stipulations, UTP documents, and the testimony of numerous of its own officials and staff-personnel at trial;²³¹ (iii) the testimony of Plaintiffs' expert-witness in accounting—supported in every particular by testimony of the UTP's own witnesses—that the organization's financial and accounting documents the UTP sought to introduce at trial were incompetent to show the extent of either its [52] "political" or its "collective-bargaining" activities;²³² and

²²⁸ PFF No. 37.

²²⁹ *Id.* Nos. 103-20, 134-40.

²³⁰ On "essentiality" and "substantiality" of political involvement as legal tests of a political-action organization, see Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 323-49 (1978).

²³¹ PFF Nos. 57-97, 121-33.

²³² *Id.* Nos. 145-60.

(iv) the testimony of various UTP officials and staff-personnel concerning how, allegedly, they have spent their time on behalf of the organization.²³³ And here, once again, the Court says nothing about the experts' testimony, choosing instead to "find"—on the basis of no, or inadmissible, evidence²³⁴—that, even if the UTP does engage in political activity, that activity is "related to collective bargaining issues".²³⁵

Whether the UTP is a political-action, or predominantly political organization is a question of fact beyond the common knowledge, experience, and understanding of laymen, as Plaintiffs' expert-witness in political science, Professor Tullock, testified without contradiction.²³⁶ None the less, the UTP called no expert-witness of its own in political science.²³⁷ This alone justifies a telling adverse inference against the UTP.²³⁸ In addition, the testimony of Plaintiffs' expert was inherently believable, unequivocal, unchallenged as to scientific accuracy, without demonstrated errors, and unshaken on cross-examination.²³⁹ Indeed, Professor Tullock testified that the record in this case is "more complete [53] than [he had] ever seen before on any pressure group",²⁴⁰ and that it exposes the UTP as an integrated, predominantly political organization.²⁴¹ Moreover, no one attempted to impeach Plaintiffs' expert by questioning his

²³³ *Id.* Nos. 161-67.

²³⁴ *Id.* Nos. 168-72.

²³⁵ CFF §§ II.B. and II.C.

²³⁶ PFF No. 105.

²³⁷ *Id.* No. 103.

²³⁸ *Ante*, note 193 & accompanying text.

²³⁹ *See ante*, notes 181-85 & accompanying text.

²⁴⁰ PFF No. 111.

²⁴¹ *Id.* No. 116.

qualifications, competency, integrity, credibility, or personal interest in the proceedings, or by suggesting that his demeanor impugned his trustworthiness.²⁴² Furthermore, the record overflows with examples of testimony from the UTP's own officials and staff-personnel, and statements in the UTP's own documents that substantiate, point for point, Professor Tullock's conclusions.²⁴³

Under these circumstances, this Court had no power to disregard the testimony of Plaintiffs' political scientist, but instead should have adopted his judgment on the ultimate fact of the UTP's predominantly political character.²⁴⁴ The Court's disability is particularly striking given its explicit assignment of the burden of proof on this very issue to the UTP.²⁴⁵ Obviously, "[t]his burden cannot be spirited away by the simple method . . . of the court's saying it does not believe the evidence, therefore there is no evidence, therefore there is no burden"²⁴⁶—let alone by the even-more-transparent evasion of saying nothing about the evidence at all.

[54] Evidently sensing the shocking anomaly of first assigning the burden of proof to the UTP, and then ruling in its favor even after Plaintiffs' expert-witness testified (without contradiction) that the record in this case is "more complete than [he had] ever seen before on any pressure group",²⁴⁷ this Court suggests that Plaintiffs'

²⁴² See *ante*, notes 186-92 & accompanying text.

²⁴³ PFF Nos. 57-97, 121-33, and compare with *id.* Nos. 108-10, 114-15.

²⁴⁴ See *ante*, notes 194-95 & accompanying text.

²⁴⁵ CFF at 2 n.1.

²⁴⁶ *Amador Beltran v. United States*, 302 F.2d 48, 52 (5th Cir. 1962).

²⁴⁷ Professor Tullock, of course, is one of the leading political scientists in the United States, primarily responsible for develop-

other "affirmative evidence" (for the Court carefully refrains from conceding Professor Tullock's existence) is "unpersuasive", because: (i) "[i]t fails to distinguish between activity related to collective bargaining and political activity unrelated to that end"; (ii) Plaintiffs' "content analysis assumes that the [UTP] publications analyzed accurately reflect the range of activities actually undertaken by the organizations, an assumption unsupported by the record as a whole"; and (iii) "[t]he analysis of organizational publications was * * * outweighed by the firsthand testimony of the officers and staff of such organizations and the budgetary and other records of their activity".²⁴⁸ Each of these reasons for rejecting, *sub silentio*, Professor Tullock's uncontradicted expert-testimony is meritless.

Plaintiffs admit that, in so far as their "exclusive representative" engages solely in "collective bargaining" or political activity not "unrelated to collective bargaining" within the meaning of those terms as used in *Abood v. Detroit [55] Board of Education*,²⁴⁹ PELRA can require Plaintiffs to associate with that "representative" without infringing their First-Amendment rights on the ground of the "representative's" political nature.²⁵⁰ Or, if the UTP could demonstrate that all (or the vast majority) of its political activities are, in fact and law under *Abood*, "related to collective bargaining", it would establish a *defense* to Plaintiffs' claims in this particular.

ing the "theory of public choice" that brings to the field of political action the techniques of economic analysis. Transcript of Hearings Before the Special Master (T.) at 3608-14.

²⁴⁸ CFF at 12-13.

²⁴⁹ 431 U.S. 209 (1977).

²⁵⁰ PELRA is nevertheless unconstitutional as applied, though, for reasons beyond the UTP's predominantly political character. See *ante*, pp. 14-16.

But here, as in the general case, *the party relying on a defense has the burden of proving it.*²⁵¹ This Court itself has imposed the burden of establishing its non-political character on the UTP.²⁵² And the First Amendment does so anyway,²⁵³ demanding clear and convincing evidence of all the constitutional facts.²⁵⁴ Plaintiffs, therefore, were under [56] no compulsion pre-emptively to disprove in their case-in-chief the UTP's possible defense that its political activities predominantly "relate to collective bargaining".²⁵⁵ Certainly, if its political activities had such a demonstrable character, the UTP possessed evidence to prove it—and Plaintiffs did not establish the UTP's proofs for it

²⁵¹ *E.g.*, *United States v. Poland*, 251 U.S. 221, 227-28 (1920); *Tendler v. Jaffe*, 203 F.2d 14, 17 (D.C. Cir. 1953); *see Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 588-90 (1st Cir. 1979); *Alabama Power Co. v. FPC*, 511 F.2d 383, 390-91 (D.C. Cir. 1974); *cf. Niccum v. Farmers Cooperative Elevator Co. of Giltner, Nebraska*, 457 F.2d 453, 455 (8th Cir. 1972) (Breitenstein, Heaney, and Stephenson, J.J.); *J.A. Bass Co. v. United States to the use of Peter Kiewit Sons' Co.*, 340 F.2d 842, 844 (8th Cir. 1965); *Williams v. Administrator of NASA*, 463 F.2d 1391, 1400 (Ct. Cust. & Pat. App. 1972); *United States v. Smith*, 215 F.2d 217, 219 (6th Cir. 1954); *Pacific Portland Cement Co. v. Food Machinery & Chem. Corp.*, 178 F.2d 541, 546-47 (9th Cir. 1949); *Bauer v. Clark*, 161 F.2d 397, 400 (7th Cir. 1947).

²⁵² CFF at 2 n.1.

²⁵³ *See ante*, notes 54-57 & accompanying text.

²⁵⁴ *Ante*, notes 73-79 & accompanying text. In this instance, the "constitutional facts" would be those showing either (i) that the UTP is predominantly non-political in character, or (ii) that its political activity is predominantly "related to collective bargaining" in the sense mandated by *Abood*.

²⁵⁵ *See, e.g., Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 457-60 (2d Cir. 1975).

by failing "to supply evidence of the negative of [that] proposition".²⁵⁶

The stipulations, the trial-testimony and exhibits, and particularly the testimony of Professor Tullock established at least a *prima facie* case that the UTP is a predominantly political organization. Even had Plaintiffs had the burden of proof on this issue, they would have prevailed in the absence of any rebuttal from the UTP.²⁵⁷ At the end of Plaintiffs' case-in-chief, therefore, the UTP knew (or should have known) that, *whoever had the ultimate burden of proof*, "the occasion had arisen" for the UTP to present whatever evidence it had demonstrating the "relation" (if any) of its political activities to "collective bargaining".²⁵⁸ If the UTP objected to judgments of Plaintiffs' expert-witness and others based on the contents of its own documents, it should have introduced other documents, or "more accurate" analyses.²⁵⁹ [57] Plaintiffs having done "everything that was possible for [them] to do", the UTP had to demonstrate that Plaintiffs' assessments of its political activities were erroneous.²⁶⁰

At trial, however, both Plaintiffs' expert-witness in accounting, and the UTP's lay accounting-witnesses, unanimously agreed that NEA's, MEA's, and MCCFA's financial documents *did not and could not* isolate and quantify organizational activities and costs under the categories

²⁵⁶ *Henry Hanger & Display Fixture Corp. v. Sel-O-Rak Corp.*, 270 F.2d 635, 642 (5th Cir. 1959).

²⁵⁷ *See, e.g., G.H. Miller & Co. v. United States*, 260 F.2d 286, 288 (7th Cir. 1958).

²⁵⁸ *See, e.g., Milom v. New York C.R.R. Co.*, 248 F.2d 52, 55 (7th Cir. 1950).

²⁵⁹ *See, e.g., Continental Oil Co. v. United States*, 184 F.2d 802, 813-15 (9th Cir. 1950).

²⁶⁰ *Hoffman v. Commissioner*, 298 F.2d 784, 786-88 (3d Cir. 1962).

"politics" and "collective bargaining".²⁶¹ But, if the UTP's own accounting-systems could not break down the organization's activities into even the two gross categories "politics" and "collective bargaining", how from those documents did the UTP demonstrate the more refined differentiation between "politics 'related to collective bargaining'" and "politics 'unrelated to collective bargaining'"?! Self-evidently, one cannot show how much of *X* is "related" (by any definition) to *Y*, unless one can first identify and isolate *X* and *Y*.

To be sure, the UTP attempted to introduce a so-called "political-activity-rebate procedure" for NEA, whereby NEA allegedly has calculated the amount of its yearly political activity "unrelated to collective bargaining". (MEA and MCCFA admitted to having no such "procedures".²⁶²) But this "rebate procedure" was patently inadmissible, and otherwise unreliable.²⁶³ [53] Plaintiffs' expert-witness in accounting testified without contradiction that the "procedure" failed to "satisfy the requirements of generally accepted principles of cost analysis", for numerous reasons,²⁶⁴ and did not constitute a good-faith attempt to

²⁶¹ PFF Nos. 145-153. All of NEA-PAC's and IMPACE's expenditures relate to partisan (electoral) politics, and therefore are "unrelated to collective bargaining" as a matter of law. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-36 (1977) (opinion of Stewart, J.).

²⁶² PFF No. 154.

²⁶³ *Id.* No. 157.

²⁶⁴ *Id.* Nos. 158-59. Revealingly, the UTP called as the sole witness on the "rebate procedure" NEA Deputy Executive Director Dunn. Dunn's actual participation in the calculation was peripheral and mechanical. *See id.* No. 157. Dunn, however, is a certified public accountant. But the UTP did not even attempt to qualify him as an expert concerning NEA's "rebate" or any other financial documents. *See id.* at 65 n.244.

quantify even NEA's political expenditures.²⁶⁵ And, in any event, rather than a "defense" to Plaintiffs' charge that NEA is part of a predominantly political organization, "the procedure" constituted an admission of *substantial* political activities "unrelated to collective bargaining" at the UTP's national level.²⁶⁶

So, in short, whatever the definition of "political activity 'related to collective bargaining' ", it was the UTP's burden to show that such activity existed; and all the competent evidence in the record disproves *even the possibility* that the UTP could, or did, make such a showing.

More importantly, the UTP has explicitly stipulated that, under the definition of "political activity 'related to collective bargaining' " permissible according to *Abood*, NEA and MEA have engaged in essentially *no* such activity. The plurality in *Abood* held that, although "collective bargaining" in public-sector employment is itself a "political" activity, a State statute could require dissenting employees such as Plaintiffs to associate [59] with an "exclusive representative" such as MCCFA for the purposes of "bargaining".²⁶⁷ And it went on to hold that certain other "political" activities "might be seen as an integral part of the bargaining process."²⁶⁸

The definition of "collective bargaining" used in *Abood*, though, was quite precise. The Michigan statute at issue itself defined "collective bargaining" as

the performance of the mutual obligation of the employer and the representative of the employees to meet

²⁶⁵ *Id.* No. 160.

²⁶⁶ *Id.* No. 156.

²⁶⁷ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 227-32 (1977) (opinion of Stewart, J.).

²⁶⁸ *Id.* at 236.

at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement if requested by either party.²⁶⁹

And the *Abood* plurality reflected just such an understanding of "collective bargaining"—but no more. For example, the plurality referred to "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances";²⁷⁰ by way of examples, it spoke of "the union's policy in negotiating a medical benefits plan", "a union policy of negotiating limits on the right to strike", "the union's wage policy", and [60] "the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination";²⁷¹ it wrote of "expenditures" and "service charges * * * applied to collective bargaining, contract administration, and grievance-adjustment purposes";²⁷² and it distinguished from "collective-bargaining activities" those "social activities" that "fall outside the Union's duties as exclusive representative".²⁷³ Recognizing that successful "negotiating [of] a final agreement" might require "the approval of a higher executive authority or a legislative body",²⁷⁴ the plurality added that "subsequent approval [of a written collective-bargaining agreement] by other public authorities" and

²⁶⁹ Mich. Comp. Laws § 423.215.

²⁷⁰ 431 U.S. at 221.

²⁷¹ *Id.* at 222.

²⁷² *Id.* at 225-26, 232.

²⁷³ *Id.* at 236 n.33.

²⁷⁴ *Id.* at 228.

"related budgetary and appropriations decisions might be seen as an integral part of the bargaining process".²⁷⁵ Overall, then, the *Abood* plurality held that "collective bargaining" means just that: namely, (i) negotiating an agreement with the public employer; (ii) where necessary, seeking the "approval of a higher executive or legislative body" to ratify or implement the agreement; (iii) administering the agreement; and (iv) processing individual grievances under the agreement—in short, performing the statutory duties of the "exclusive representative". Nowhere in *Abood* is there any suggestion, let alone a decision, that "collective bargaining" includes participation in candidates' [61] campaigns, general lobbying, propaganda and agitation, political litigation, or political organizing—in which the UTP is involved, in Minnesota and throughout the United States, to a substantial degree.²⁷⁶

Moreover, *Abood* makes clear that, with respect to a particular organization acting as an "exclusive representative" of particular public employees, "collective bargaining" refers—and constitutionally can refer—only to those activities the "representative" performs, pursuant to the applicable statute, *within the "bargaining-unit" to which the employees belong*. The policy-reasons that arguably justify compelling dissenting public employees to associate with a private organization as their "exclusive representative" rationally apply only to the unit in which those employees function—for only there does the "representative" have "great responsibilities" *relative to those employees*;²⁷⁷ only there may the "representative's" task "entail expenditure of much time and money", or even *any* time and money, ostensibly *on behalf of those employees*;²⁷⁸

²⁷⁵ *Id.* at 236.

²⁷⁶ See PFF Nos. 57-97, 121-33.

²⁷⁷ 431 U.S. at 221.

²⁷⁸ *Id.*

only there will *those employees* possibly have "the incentive . . . to become 'free riders'";²⁷⁹ only there is the "representative" "under a duty of fair representation" *to those employees*;²⁸⁰ only there will "confusion and conflict" *as to those employees' terms and conditions of employment* arguably [62] be mitigated by collective negotiations;²⁸¹ and only there will "labor peace" among those employees be served (if at all²⁸²) by "collective bargaining".²⁸³

Or, in sum, "collective bargaining" under *Abood* means negotiation and administration of an agreement concerning terms and conditions of employment for employees in the "bargaining-unit" under consideration, and (where applicable) "political" activity (such as lobbying) that is "an integral part of the bargaining process" because it is necessary to ratify or implement the negotiated agreement. "Collective bargaining" for employees in unit *A*, then, does *not* include *any* activity the organization designated as their "exclusive representative" performs for employees in some separate units *B*, *C*, or *D*—even if that organization is also the "representative" in those units. Rather, with respect to the employees in unit *A*, the activities of the "representative" in units *B*, *C*, or *D* constitute "political activities 'unrelated to collective bargaining'" because: (i) that other activity is "political", by definition; and (ii) it is not a part "of the bargaining process" in the relevant "bargaining-unit".

If, therefore, an "exclusive representative" engages in political activity with no even colorable connexion to "collective bargaining" (such as partisan politics) to a degree

²⁷⁹ *Id.* at 222.

²⁸⁰ *Id.* at 224.

²⁸¹ *Id.*

²⁸² See PFF Nos. 202-07.

²⁸³ 431 U.S. at 224.

sufficient to render it a predominantly political organization, a State statute that requires dissenting employees to accept that "representative" is unconstitutional as applied under the First [63] Amendment.²⁸⁴ But, by a parity of reasoning, if an "exclusive representative" engages to the same degree in "collective bargaining" *outside* of the relevant "bargaining-unit", that *external* "bargaining" becomes, by constitutional hypothesis, "political activity 'unrelated to collective bargaining' " in the relevant unit; and a State statute that requires dissenting employees in that unit to accept that "representative" is also unconstitutional as applied. For, *as to those employees*, the "representative's" *external* "politics" is "politics", pure and simple, even if, *as to some other employees*, it might be "collective bargaining".

PELRA, of course, does not use the term "collective bargaining". But the statute embodies that concept under the rubric "meet and negotiate", which it defines as

the performance of the mutual obligations of public employers and the exclusive representatives of public employees to meet at reasonable times, including where possible meeting in advance of the budget-making process, with the good faith intent of entering into an agreement with respect to terms and conditions of employment * * *.²⁸⁵

PELRA also implies that "exclusive representatives" might have need to engage in lobbying (a "political" activity) as "an integral part of the bargaining process" in order to help secure ratification of a negotiated agreement.²⁸⁶ Under PELRA, then, the only "political" activity of their "exclusive representative" that *Abood* says Plain-

²⁸⁴ *Ante*, note 62 & accompanying text.

²⁸⁵ Minn. Stat. § 179.63, subd. 16.

²⁸⁶ Minn. Stat. § 179.70, subd. 2.

tiffs must accept as a condition of employment includes: (i) participation of MCCFA in the "meet-and-negotiate" process; and arguably (ii) lobbying [64] by MCCFA directed at the Minnesota Legislature to secure ratification of the agreements negotiated in that process. If, therefore, NEA's and MEA's "political" activity "relates to collective bargaining ('meet[ing] and negotiat[ing]')" under PELRA, it must involve participation by those units' officials and staff-personnel in the aforesaid two activities, on behalf of community-college faculty-members, *and in those activities alone*. Nothing that NEA and MEA may do in or for *other* "bargaining-units" in Minnesota or anywhere else in the United States constitutes "collective-bargaining activity" *with respect to the community colleges or to Plaintiffs*. To the contrary: it constitutes pure—and, therefore, proscribed—"political" activity.

This Court, of course, purports to find as a "fact" that NEA and MEA "engage in a wide range of legislative, governmental and public relations activities that are closely related to furtherance of [their] collective bargaining activities".²⁸⁷ This, however, even if proven (which it was not²⁸⁸) is insufficient to support the factual-cum-legal conclusion that NEA's and MEA's "political" activities "relate to collective bargaining" in the unique legal sense in which *Aboud* uses that phrase. For that conclusion requires the further finding, which the Court does *not* make, that these "political" activities are demonstrably part of the process of "meet[ing] and negotiat[ing]" or part of the ancillary lobbying-process by which MCCFA urges the Minnesota Legislature to accept its negotiated agreements. And the Court [65] does not make this finding, because even it realizes it cannot. The record contains *no* evidence that the predominant part, any significant part, or even any ascer-

²⁸⁷ CFF at 12.

²⁸⁸ See *post*, pp. 202-04, 207-09, 210-11.

tainable part of NEA's or MEA's "political" activity has anything whatsoever to do with seeking ratification by the Minnesota Legislature of agreements MCCFA negotiates, or with negotiating those agreements in the first instance. Indeed, *the UTP has stipulated to the very opposite*, conceding that *no* personnel from NEA, and only *one* staffman from MEA, have participated at all in "meet[ing] and negotiat[ing]" on behalf of MCCFA in Minnesota since 1 July 1971.²⁹⁹

From this it follows that, even if Plaintiffs had had the burden of proving that the UTP's "political" activity does not "relate to collective bargaining ('meet[ing] and negotiat[ing]')", Plaintiffs have met that burden by introducing the UTP's own conclusive admissions to that effect. And this Court had no power to disregard that proof.³⁰⁰ Having adduced more than a *prima facie* case of the UTP's predominantly political character through the uncontradicted testimony of their expert-witness in political science, and having in the UTP's own stipulations a pre-emptive rebuttal of the "defense" the UTP's own witnesses (together with Plaintiffs' expert in accounting) testified its financial documents were incompetent to prove, Plaintiffs were (and are) entitled as a matter of law to a finding by this Court of the ultimate fact that the UTP is a predominantly political organization. And this Court's contrary conclusion, therefore, is clearly erroneous.

[66] The Court's further rationalization for this erroneous result, that Plaintiffs' content-analyses were somehow defective, is also without substance. The Court first claims that the analyses "'trea[t] all 'lobbying, organizing and litigation' matters as separate from 'collective bargaining.' Lobbying, organizing and litigation activities that

²⁹⁹ PRS Nos. 49-50.

³⁰⁰ *E.g.*, United States v. Sommers, 351 F.2d 354, 357 (10th Cir. 1965).

directly relate to collective bargaining issues are thus excluded from the 'collective bargaining' category".²⁹¹ This merely restates the erroneous premiss that Plaintiffs had the burden preemptively to disprove the UTP's possible (but undemonstrated) "defense" that its "political" activities "relate to collective bargaining" in the sense permissible under *Abood*.²⁹² The burden of proof in this particular, however, was on the UTP. In the nearly two years prior to trial that it had Plaintiffs' content-analyses, the UTP enjoyed ample opportunity to develop its own analyses showing the extent to which (if any) its "lobbying, organizing, and litigation" activities "relate to collective bargaining"—yet, during that time and at trial, it failed to produce any such analysis.²⁹³ Plaintiffs, in short, adduced a *prima facie* case on this subject, even though the UTP had the ultimate burden of proof on the issue [67] of its predominantly political character; and the UTP produced no contradictory evidence at all, making no attempt even to interrogate Plaintiffs' witness on any specific example in the content-analyses.²⁹⁴ As a matter of law, then, Plain-

²⁹¹ CFF at 12.

²⁹² The Court makes yet another mistake when it describes the test as one of "relat[ing] to collective bargaining issues". Under *Abood*, "political" activity "relates to collective bargaining" if it rationally "might be seen as an integral part of the bargaining process". 431 U.S. at 236 (opinion of Stewart, J.). It is not enough that some "political" activity "relates" to a general "issue", such as medical insurance, that may in some form be the *subject* of "collective bargaining" somewhere. Rather, the "political" activity must be part of the *process* of "bargaining" for medical insurance—in the Minnesota community colleges, part of "meet[ing] and negotiat[ing]" or of lobbying the Minnesota Legislature to ratify a negotiated agreement.

²⁹³ See PFF Nos. 134-35.

²⁹⁴ *Id.* No. 135.

tiffs adduced a preponderance of the evidence on this subject, and are entitled to a finding in their favor.²⁹⁵

Next, the Court claims that Plaintiffs content-analyses were faulty because they "assum[e] that the publications * * * reflect the range of activities actually undertaken by the organizations, an assumption unsupported by the record as a whole".²⁹⁶ Again, the Court is wrong, on the law and the facts. Whether or not the publications actually "reflect the range of [UTP] activities", they constitute admissions by that organization of its involvement in political activism.²⁹⁷ To be sure, such admissions [68] are in theory rebuttable—but, here, in fact the UTP produced no rebuttal. Therefore, the admissions are conclusive against it, whether accurate or not. Actually, though, the publications did accurately "reflect the range of [UTP] activities". Plaintiffs' expert in political science, Professor Tullock, testified without contradiction that content-analysis of publications is a standard technique in political science,²⁹⁸ that Plaintiffs' content-analyses in particular were sound in methodology and execution,²⁹⁹ and that in his professional opinion the UTP publications accurately "reported

²⁹⁵ See, e.g., *G.H. Miller and Co. v. United States*, 260 F.2d 286, 288 (7th Cir. 1958); *Husbands v. Pennsylvania*, 395 F. Supp. 1077, 1139 (E.D. Pa. 1975).

²⁹⁶ CFF at 12-13.

²⁹⁷ *E.g.*, *Roberts Dairy Co. v. Commissioner*, 195 F.2d 948, 949 (8th Cir. 1952); *Haswell v. United States*, 500 F.2d 1133, 1137 (Ct. Cl. 1974); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972); *American Hardware & Equip. Co. v. Commissioner*, 202 F.2d 126, 128 (4th Cir. 1953); *Krohn v. United States*, 246 F. Supp. 60, 64 (E.D. Mo. 1964), *aff'd*, 349 F.2d 828 (8th Cir. 1965); *League of Women Voters v. United States*, 180 F. Supp. 379, 381-82 (Ct. Cl. 1960).

²⁹⁹ PFF No. 136 & n.230.

³⁰⁰ *Id.* No. 140.

what was going on" in the organization.³⁰¹ And the only other testimony and stipulations in the record fully supported these observations.³⁰²

More interestingly, the Court conveniently forgets that Plaintiffs produced content-analyses, not only of publications, *but also of minutes of the UTP's governing-bodies*. Obviously, even the Court cannot pretend that the minutes of the UTP's governing-bodies do not presumptively "reflect the range of activities actually undertaken by the organizatio[n]",³⁰³ or that there is anything whatsoever in the "record as a whole" that undermines such a presumption. Yet, content-analysis of, for example, the minutes of MEA's Board of Directors gave [69] results for all practical purposes identical to analysis of MEA's newspaper: 78% "politics" *versus* 22% "collective bargaining" for the minutes, as against 77% "politics" *versus* 23% "collective bargaining" for the newspaper.³⁰⁴ Self-evidently, then, the purported finding that "the record as a whole" fails to support the content-analyses is itself without such support, and is clearly erroneous.

Finally, the Court claims that "[t]he analysis of organizational publications was * * * outweighed by the first-hand testimony of the officers and staff of such organizations and the budgetary and other records of their activ-

³⁰¹ *Id.* No. 110 & nn.148-49.

³⁰² *Id.* at 41 n.149; PRS Nos. 376-78, 389, 395-401.

³⁰³ *See, e.g.*, *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 69-70 (1827); *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 423-24 (1820); *Thomas v. Commissioner*, 232 F.2d 520, 526 (1st Cir. 1956); *Alder v. Consumers Co.*, 152 F.2d 696, 699 (7th Cir. 1945); *Caldwell v. Commissioner*, 135 F.2d 488, 490 (5th Cir. 1943).

³⁰⁴ PFF No. 117 & n.182.

ity.³⁰⁵ Again, the Court focusses on “organizational *publications*”, conveniently forgetting about Plaintiffs’ content-analyses of the organization’s *minutes*. But, of course: No one could possibly credit “testimony of the officers and staff” where such testimony flies in the face of the organization’s own official records.³⁰⁶ Therefore, the Court must pretend that political-scientific analyses of those records does not exist.

Even if such analyses were absent, however, the Court would nevertheless be wrong, factually and legally. As explained earlier, the UTP’s “budgetary and other records” could not break down the organization’s activities even into the two gross categories “politics” and “collective bargaining”, let alone into the more refined categories “politics ‘related to collective bargaining’” and “politics ‘unrelated to collective bargaining’”.³⁰⁷

[70] That being so, the “budgetary and other records” were admittedly incompetent to contradict Plaintiffs’ content-analyses, besides being inadmissible on other grounds.³⁰⁸ And any other “finding” is clearly erroneous.

Furthermore, the “first-hand testimony of the officers and staff” of the UTP, where not demonstrably false,³⁰⁹ did not satisfy the clear-and-convincing-evidence standard

³⁰⁵ CFF at 13.

³⁰⁶ See, e.g., *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-96 (1948); *United States v. IBM Corp.*, 66 F.R.D. 154, 158-60 (S.D. N.Y. 1974).

³⁰⁷ *Ante*, pp. 57-58.

³⁰⁸ See PFF Nos. 168-71.

³⁰⁹ See PFF at 86 n.310, 87 n.311, 90 n.331, 94 n.344; Plaintiffs’ Motion to the Special Master to Re-Open the Trial Record, and for Sanctions Against the United Teaching Profession Defendants (3 February 1981), at 10-23.

applicable in this First-Amendment case.³¹⁰ For a prime example, most of this “firsthand testimony” came from several of MEA’s UniServ Directors, who purported to “guess” and “estimate” how much of their working-time they devoted to various activities, including “politics” and “collective bargaining”.³¹¹ Besides being defective in its own right, this testimony flies in the face of stipulations that neither NEA nor MEA can determine how much money UniServ units in Minnesota, or anywhere else in the United States, have expended on “politics” or “collective bargaining”,³¹² and that neither NEA nor MEA can determine how much of their working-time UniServ Directors in Minnesota, or anywhere in the United States, have expended on “politics” or “collective bargaining”.³¹³ It also directly contradicts [71] the UTP’s own *Summary Report on the Qualitative and Quantitative Evaluation of UniServ* (1977),³¹⁴ which summarizes reports of UniServ staff-personnel and UTP officials on the substantial involvement of UniServ units in political activism throughout the United States.³¹⁵ And the claims of these UniServ Directors is

³¹⁰ See PFF Nos. 161-67 for detailed, destructive analysis of this testimony.

³¹¹ PFF Nos. 161(ii, x-xvii), 163.

³¹² PRS Nos. 69-85.

³¹³ *Id.* Nos. 86-102.

³¹⁴ On the accuracy of this survey, see *id.* No. 537.

³¹⁵ *Id.* No. 1629:

Activities Characterizing the UniServ Unit Staff Perspective

When asked to describe the kinds of activities the UniServ units were engaged in, staff members reported considerable involvement in activities related to politics, with particular emphasis on the electing of candidates to local office (95%) and state office (94%). A lower level of involvement is re-

ported by staff for electing candidates to office at the federal level (88%).

The degree to which these activities are considered appropriate to the UniServ unit tends to run parallel to the level of involvement noted in the activity as described above.

In terms of how successful they are in carrying out these functions, success at the state level is reported at 83%, at the local level at 77%, and at the federal level at 69%.

* * * *

Training for political action is an area in which most UniServ units claim involvement (96%). Only three-quarters of staff members participating in this activity feel their efforts have been successful.

* * * *

Activities Describing the UniServ Unit State President Perspective

* * * *

Other areas in which state presidents report that their UniServ units are heavily involved with high levels of success are electing candidates for office on the state level (92%), lobbying to support education-related issues (87%), political activity for electing candidates to office on both the local (87%) and the federal level (87%) and training for political action (87%).

There was a relatively low level of involvement in improving curriculum (51%). * * *

* * * *

Activities Describing the Uni-Serv Unit Local Presidents and Local Presidents in Density Areas Perspective

Without exception local presidents, including local presidents in density areas, said they were involved in political activity for electing candidates on the local level. Success in this area was reported by 88%.

Other areas in which virtually total involvement (99%) was expressed were political activity for electing candidates

[72] belied by *post*-trial evidence showing that their trial-testimony was part of another UTP "cover-up" engineered to defraud [73] Plaintiffs and this Court.³¹⁶ Under these circumstances, "[w]here such testimony is in conflict with contemporaneous documents", it is entitled to "little weight, particularly when the crucial issues involve mixed questions of law and fact"³¹⁷—and this Court's purported finding to the contrary is clearly erroneous.

So, once again, what the record actually shows is that this Court has disregarded the uncontradicted testimony of Plaintiff's expert-witness in political science, the parties' stipulations, a massive catalogue of admissions from UTP documents and the testimony of its own officials and staff-personnel,³¹⁸ and the Court's own assignment of the burden

to office on the state level, lobbying to support education-related issues and communications associated activities.

* * *

Activities Describing the UniServ Unit Local Presidents in Sparsity Areas Perspective

* * *

Only two other activities were participated in by more than 90% of sparsity presidents' units. These were political activity for electing candidates on the local level and the state level, each at 94%. Sparsity presidents believe they have a higher degree of success at the state level (80%) than at the local level (72%).

³¹⁶ Plaintiffs' Motion to the Special Master to Re-Open the Trial Record, and for Sanctions Against the United Teaching Profession Defendants (3 February 1981), at 7-10.

³¹⁷ United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948).

³¹⁸ Amazingly, for example, the Court asserts that there may be UTP "litigation activities that directly relate to collective bargaining issues". CFF at 12. Yet, MEA's own Executive Director

of proof, and simply adopted the unsubstantiated arguments of the UTP's attorneys that: (i) the major part of the UTP's "political" activities "relate to collective bargaining"; and (ii) because Plaintiffs did not somehow disprove this airy assumption, the UTP is entitled to an ultimate "finding" that it is not a predominantly political organization. Once again, however, arguments of counsel are not evidence,³¹⁹ and certainly cannot overcome the stupendous weight of factual matter establishing that the UTP is a political-action organization.

[74] In short, simply on the basis of the general rules of evidence, this Court must set aside its purported finding that the UTP is not a predominantly political organization, and enter a new ultimate finding to the contrary.

d. This Court should have adopted the uncontradicted conclusion of Plaintiffs' expert-witness in accounting that the United Teaching Profession did not and could not prove the extent of its involvement either in "politics" or in "collective bargaining".

Fourth, this Court claims that the UTP is not a predominantly political organization, "based on the testimony of numerous officers and staff of MCCFA, MEA and NEA * * *, in addition to the many exhibits relating to budget allocations of each organization".³²⁰ This purported finding Plaintiffs have already demonstrated to be worthless, because it ignores the sole, uncontradicted expert-testimony in the case, misrepresents numerous other facts, and assumes as a "fact" what the UTP must, but did not, prove as to the "collective-bargaining" nature of its "political"

conceded at trial that "collective bargaining" does *not* include litigation over so-called "teachers' rights". PFF at 68 n.256.

³¹⁹ *Ants*, notes 224-27 & accompanying text.

³²⁰ CFF at 12.

activity.³²¹ Hereinafter, Plaintiffs show that adopting "the testimony of numerous officers and staff of MCCFA, MEA and NEA" is clearly erroneous, because that testimony does not satisfy the clear-and-convincing-evidence standard.³²² At this juncture, Plaintiffs emphasize that, once again, the Court's claim simply disregards the uncontradicted testimony of another of Plaintiffs' expert-witnesses, Mr. Ross, a certified public accountant, who testified—*with complete corroboration from every [75] UTP witness who spoke to the subject*—that "the many exhibits relating to budget allocations of each organization" did not, and could not, provide evidence that the UTP's "political" activities were "related to collective bargaining" in the sense permissible under *Abood*.

Mr. Ross was the only *expert*-witness in accounting who testified at trial; of the three witnesses who testified for the UTP concerning "the many exhibits relating to budget allocations", one is a certified public accountant but did not testify as an expert, and the other two are mere laymen.³²³ Mr. Ross also has special expertise in the area of accounting involved in this litigation.³²⁴ Mr. Ross' testimony was unequivocal: Having reviewed all of the financial documents and other materials the UTP offered as exhibits at trial, and having been present during and reviewed the transcripts of the testimony of all of the UTP's three witnesses on "budget allocations",³²⁵ Mr. Ross gave his professional opinion that *none* of the financial documents of NEA, MEA, or MCCFA had "a specific data base * * * so as to yield information with respect to political expenditures or collec-

³²¹ *Ante*, pp. 51-73.

³²² *Post*, pp. 151-67.

³²³ PFF No. 145.

³²⁴ *Id.* No. 146.

³²⁵ *Id.* No. 149.

tive bargaining expenditures"; that *none* of the charts the UTP offered as exhibits at trial provided useful information for quantifying such expenditures; and that *no* exhibit the UTP proffered at trial supplied information satisfying generally accepted accounting standards and practices with respect to the calculation of such expenditures.³²⁶ And [76] witnesses for NEA,³²⁷ MEA,³²⁸ and MCCFA³²⁹ fully concurred in Mr. Ross' judgments.

How, then, does this Court dare to say that "the many exhibits relating to budget allocations of each organization" support a "finding" that the UTP is not a predominantly political organization?! How can these "exhibits" provide such knowledge to the Court, when even the UTP's own witnesses admitted that the exhibits were *incompetent* to quantify "political" and "collective-bargaining" expenditures, and when the unique expert-witness in accounting testified that *no* exhibit satisfies even generally accepted accounting standards and practices with respect to that quantification?! How can *no* information with respect to the UTP's level of political involvement qualify as clear and convincing evidence of that level of involvement—or even as a preponderance of the evidence, substantial evidence, a scintilla of evidence, or any evidence at all?! *No evidence is no evidence*, whatever this Court purports to "find" to the contrary. And no evidence is not enough to support a finding of fact.³³⁰ So, once again, the record proves beyond cavil that this Court pays more attention to the unsubstantiated

³²⁶ *Id.* No. 150.

³²⁷ *Id.* No. 151.

³²⁸ *Id.* No. 152.

³²⁹ *Id.* No. 153.

³³⁰ *See, e.g.,* Moore v. Chesapeake & O. Ry., 340 U.S. 573, 577-78 (1951); Naumkeag Theatres, Inc. v. New England Theatres, Inc., 345 F.2d 910, 913 (1st Cir. 1963); *In re Leichter*, 197 F.2d 955, 957 (3d Cir. 1952).

theories of the UTP's attorneys than it does to the directly contradictory testimony of the UTP's own witnesses, and the uncontradicted—indeed, fully confirmed—testimony of Plaintiffs' expert-witness.

[77] The law, however, is clear: "When a party's own testimony * * * would defeat his right to a verdict, and such statement is not modified or explained, a verdict should be directed against him".³³¹ Here, the burden of proof was on the UTP to establish, with clear and convincing evidence, that its "political" activity "relates to collective bargaining" within the sense in which *Abood* employs that concept. The UTP attempted to meet this burden by introducing "many exhibits relating to budget allocations". The testimony of the UTP's own witnesses, though, conceded that these "many exhibits" did not and could not quantify "political" or "collective-bargaining" expenditures at the local (MCCFA), state (MEA), or national (NEA) level of the UTP. No one contends that any of NEA-PAC's or IMPACE's expenditures "relate to collective bargaining" in a legally permissible sense. Therefore, even if Plaintiffs' expert-witness in accounting had not testified at all, the UTP's "own testimony * * * would defeat [its] right to a verdict"—and, therefore, "a verdict should be directed against [it]". Given the testimony of Plaintiffs' expert-witness, no other result is logically, legally, or morally possible.³³²

In short, simply on the basis of the general rules of evidence, this Court must set aside its purported finding that the UTP is not a predominantly political organization, and enter a new ultimate finding to the contrary.

³³¹ *Luther v. Loewi & Co., Inc.*, 549 F.2d 1173, 1175 (8th Cir. 1977) (Heaney, Ross, & Stephenson, JJ.).

³³² "If, indeed the evidence—expert or non-expert—is all one way, *there is no room for a contrary finding.*" *Stafos v. Missouri P.R.R.*, 367 F.2d 3124, 317 (10th Cir. 1966) (emphasis supplied).

[78] 2. Under the circumstances of this case, the least-restrictive-alternative standard of First-Amendment jurisprudence requires this Court to give controlling weight to the uncontradicted testimony of Plaintiffs' and the Defendant State Officials' expert-witnesses.

In this as in all First-Amendment litigation, Plaintiffs must prevail unless Defendants can demonstrate, with clear and convincing evidence, that, in so far as "exclusive representation" as applied under PELRA impairs Plaintiffs' freedoms of association, speech, and belief, it does so in furtherance of a "compelling" governmental interest by the means *least-restrictive* of those freedoms.³³³ Even this Court has acknowledged that such is that standard here.³³⁴ What the Court fails to acknowledge is that the least-restrictive-alternative standard, in the context of this case, compels the Court to give controlling weight to the uncontradicted testimony of Plaintiffs' and the Defendant State Officials' expert-witnesses.

a. This Court should have adopted the uncontradicted conclusion of the expert-witnesses for Plaintiffs and the Defendant State Officials that, as far as "exclusive representation" is concerned, Minnesota's Public Employment Labor Relations Act is equivalent to the National Industrial Recovery Act and to the Bituminous Coal Conservation Act.

Plaintiffs contend that, by compelling them to associate with MCCFA as their "exclusive representative", PELRA delegates to MCCFA the power to make "economic laws" concerning terms and conditions of employment and other policy-questions in the community colleges.³³⁵ Because (as

³³³ *Ante*, note 56 & accompanying text.

³³⁴ CFF at 2.

³³⁵ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 252-53 (1977) (Powell, J., concurring in the judgment).

no one denies) MCCFA [79] is a private group and not an agency of the State of Minnesota,³³⁶ say Plaintiffs, PELRA as applied in the community colleges is indistinguishable from the delegations of power to private groups to make "economic laws" under the National Industrial Recovery Act (NIRA)³³⁷ and the Bituminous Coal Conservation Act (BCCA)³³⁸ that the Supreme Court unanimously held unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*³³⁹ and *Carter v. Carter Coal Co.*³⁴⁰ Therefore, if Plaintiffs are correct as a matter of fact that PELRA as applied is equivalent to NIRA and BCCA, then as a matter of fact and law PELRA cannot be the *least-restrictive* means of achieving whatever interest Minnesota may have in "exclusive representation".³⁴¹

Plaintiffs, of course, did not have the burden of proving that PELRA is, or is not, the least-restrictive alternative. That burden this Court correctly assigned to Defendants.³⁴² But Plaintiffs did have the ability to prove that Defendants could not meet this burden. If Plaintiffs established the *minimum* scientifically satisfactory, un rebutted case for the factual equivalence of PELRA (as applied in the community colleges), NIRA, and BCCA, then they would have precluded Defendants from [80] satisfying their burden of

³³⁶ PFF Nos. 3-5; *see id.* Nos. 10-11, 13-14.

³³⁷ Act of 16 June 1933, ch. 90, 48 Stat. 195.

³³⁸ Act of 30 August 1935, ch. 824, 49 Stat. 991.

³³⁹ 295 U.S. 495, 537 (1935).

³⁴⁰ 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936).

³⁴¹ The *least-restrictive* means would involve the section as "exclusive representative" of an employee-organization (such as a traditional faculty-senate) that was an arm or adjunct of the community-college administration.

³⁴² CFF at 2.

proof. For, self-evidently, if PELRA (as applied in the community colleges) meets even the minimum satisfactory test for equivalence with NIRA and BCCA, PELRA cannot be the *least*-restrictive alternative. Or, to preclude Defendants from establishing that PELRA (as applied in the community colleges) is the *least*-restrictive alternative, all Plaintiffs needed to do was to adduce, without rebuttal, the *least*-complete satisfactory case for the connexion among the three statutes.

Unrebutted expert-testimony in political economy, economics, and labor and industrial relations establishing the equivalence of PELRA (as applied in the community colleges), NIRA, and BCCA constitutes such a case, as a matter of law. If "exclusive representation" as applied in the community colleges must be the *least*-restrictive alternative, then PELRA must not be equivalent to NIRA and BCCA to the *least* degree cognizable by the scientific disciplines qualified to make such a judgment. If Plaintiffs showed that PELRA is equivalent to NIRA and BCCA according to the analytical principles and methodologies of those disciplines, and Defendants failed to refute this demonstration with clear and convincing evidence, then Plaintiffs' case on the equivalence of PELRA, NIRA, and BCCA necessarily became conclusive; and "exclusive representation" falls under the least-restrictive-alternative standard. Expert-witnesses for Plaintiffs and for the Defendant State Officials testified without contradiction, or even challenge, to the equivalence of PELRA, NIRA, and BCCA.³⁴³ In the absence of appropriate *expert*-testimony to the opposite effect, then, no *clear and convincing* evidence exists upon which to support a finding at odds with the judgments of Plaintiffs' [81] and the Defendant State Officials' experts. And, therefore, this Court should have found as an ultimate fact that PELRA, as applied in the community colleges, is equivalent to NIRA and BCCA.

³⁴³ PFF Nos. 177-201, 208-15. *See post*, pp. 226-38.

b. This Court should have adopted the uncontradicted conclusion of Plaintiffs' expert-witnesses in organizational science that the United Teaching Profession is an integrated organization.

Plaintiffs contend that, by compelling them to associate with MCCFA as their "exclusive representative", PELRA compels them to associate with MEA, NEA, IMPACE, and NEA-PAC as well, because all those units are integrated in the UTP. Moreover, say Plaintiffs, the UTP is a political-action, or predominantly political organization.³⁴⁴ Thus, for all practical purposes of constitutional law, PELRA com-

³⁴⁴ Both Plaintiffs and the UTP, revealingly, agree on this point. Plaintiffs have shown that the UTP is predominantly political in character because it engages to a substantial degree in political activism, and such involvement is essential to the achievement of its goals. PFF Nos. 57-140. *See* Vieira, "Are Public-Sector Union Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 323-49 (1978). The UTP claims, but has not proven and admits it cannot prove, that it engages in substantial "collective-bargaining" activity, and that its "political" activity predominantly "relates to collective bargaining", too. *See* PFF Nos. 141-72. Even if its claims were established in the record, though, the UTP has also stipulated that, with the exception of one MEA staff-man, MEA and NEA (and certainly IMPACE and NEA-PAC) do not engage, and since 1 July 1971 have not engaged, in "meet[ing] and negotiat[ing]" ("collective bargaining") under PELRA on behalf of community college faculty. PRS Nos. 49-50. Therefore, the "collective bargaining" in which the UTP has supposedly engaged elsewhere in the State of Minnesota and in other places throughout the United States (if any) amounts, *as to Plaintiffs*, to "political activity". Or, *all* of the UTP's "political" and "collective-bargaining" activities outside of the Minnesota community colleges are, as a matter of law under *Abood*, "political activities" with respect to Plaintiffs. *See ante*, pp. 58-65. Which makes the UTP a predominantly political organization—because the contributions of MEA, NEA, IMPACE, and NEA-PAC to the total organizational operations far outweigh those of MCCFA.

pels Plaintiffs to associate with the legal equivalent of a political party or political [82] pressure-group.³⁴⁵ Therefore, if Plaintiffs are correct as a matter of fact that the UTP is integrated, and that it is a predominantly political organization, PELRA cannot be the *least*-restrictive means of achieving whatever interest Minnesota may have in "exclusive representation".³⁴⁶

Again, Defendants had the burden of showing that PELRA is the least-restrictive alternative.³⁴⁷ However, if Plaintiffs established the *minimum* scientifically satisfactory, unrebutted case for the integration of MCCFA, MEA, NEA, IMPACE, and NEA-PAC in the UTP, then they would have precluded Defendants from satisfying their burden of proof. For, self-evidently, if PELRA (as applied in the community colleges) compels Plaintiffs to associate with a state- and nation-wide political-action group, even if that group's activities outside the Minnesota community colleges are predominantly "related to collective bargaining", it cannot be the *least*-restrictive alternative. Or, to preclude Defendants from establishing that PELRA (as applied in the community colleges) is the *least*-restrictive alternative, all Plaintiffs needed to do was to establish, without rebuttal, the *least* complete, scientifically satisfactory case for the UTP's integration.

Unrebutted expert-testimony in organizational science constitutes such a case, as a matter of law. If "exclusive

³⁴⁵ See *Branti v. Finkel*, — U.S. —, —, 100 S.Ct. 1287, 1293-94 (1980).

³⁴⁶ The least-restrictive means would involve selection of an "exclusive representative" not integrated with any "politically" active units or groups outside the community colleges, and which itself engaged in no "political" activity other than "collective bargaining" ("meet[ing] and negotiat[ing]") on behalf of community-college faculty. See PFF Nos. 173-76.

³⁴⁷ CFF at 2.

representation" as applied in the community colleges must be [83] the *least*-restrictive alternative, then MCCFA must not be integrated with a predominantly political organization even to the *least* degree cognizable by the scientific discipline qualified to make such a judgment. If Plaintiffs showed that MCCFA *is* integrated with a predominantly political organization according to the analytical principles and methodologies of that science, and Defendants failed to refute this demonstration with clear and convincing evidence, then Plaintiffs' case on integration necessarily became conclusive; and "exclusive representation" falls under the least-restrictive-alternative standard. Plaintiffs' expert-witnesses in organizational science testified without contradiction that, "beyond a reasonable doubt",³⁴⁸ MCCFA, MEA, NEA, IMPACE, and NEA-PAC are integrated in the UTP.³⁴⁹ In the absence of appropriate *expert*-testimony to the opposite effect, no *clear and convincing* evidence exists upon which to support a finding at odds with the judgment of Plaintiffs' experts. And, therefore, this Court should have found as an ultimate fact that the UTP is integrated.

c. This Court should have adopted the uncontradicted conclusion of Plaintiffs' expert-witness in political science that the United Teaching Profession is a predominantly political organization.

As with the issue of integration, if Plaintiffs established the *minimum* scientifically satisfactory, un rebutted case that the UTP is a predominantly political organization because of (for example) its substantial involvement in "political" activity other than "collective bargaining", then they would have precluded Defendants from satisfying their burden of proof. For, self-evidently, "exclusive representation" [84]

³⁴⁸ PFF at 37.

³⁴⁹ *Id.* Nos. 25-56.

under PELRA can perform its supposed functions in the community colleges without the "representative" being an integrated, state- and nation-wide political-action organization.³⁵⁰ Or, to preclude Defendants from establishing that PELRA (as applied in the community colleges) is the *least*-restrictive alternative, all Plaintiffs needed to do was to establish, without rebuttal, the *least*-complete, scientifically satisfactory case demonstrating the UTP's predominantly political character.

Unrebutted expert-testimony in political science constitutes such a case, as a matter of law, even if Plaintiffs choose not to rely on the UTP's own admission that it is a political-action organization because the vast majority of both its "collective-bargaining" activities and its "political" activities allegedly "related to collective bargaining" take place outside of the Minnesota community colleges.³⁵¹ If "exclusive representation" as applied in the colleges must be the *least*-restrictive alternative, then the UTP must not constitute a predominantly political organization to the *least* degree cognizable by the scientific discipline qualified to make such a judgment. If Plaintiffs showed that the UTP is a political-action organization according to the analytical principles and methodologies of that science, and Defendants failed to refute this demonstration with clear and convincing evidence, then Plaintiffs' case on the UTP's political character necessarily became conclusive; and "exclusive representation" falls under the least-restrictive-alternative standard. On the basis of a record "more complete than * * * ever seen before on any pressure group",³⁵² Plaintiffs' expert-witness in political science concluded that the UTP is [85] a predominantly political organization.³⁵³ In the ab-

³⁵⁰ *Ante*, note 346.

³⁵¹ *Ante*, note 344.

³⁵² PFF No. 111.

³⁵³ *Id.* Nos. 103-20, 134-40.

sence of appropriate *expert*-testimony to the opposite effect, no *clear and convincing* evidence exists upon which to support a finding at odds with the judgment of Plaintiffs' expert. And, therefore, this Court should have found as an ultimate fact that the UTP is a political-action organization.

d. This Court should have adopted the uncontradicted testimony of Plaintiffs' expert-witness in accounting that the United Teaching Profession did not and can not prove the extent of its involvement either in "politics" or in "collective bargaining".

The UTP claims, by way of a purported defense to Plaintiffs' charge that it is a predominantly political organization, that it is predominantly engaged in "collective bargaining", or in "political" activity "related to collective bargaining" in the sense permissible under *Abood*. Its defense fails *ab initio*, however, because the UTP has already stipulated that the overwhelming preponderance of its activities had nothing whatsoever to do with "collective bargaining" ("meet[ing] and negotiat[ing]") under PELRA³⁵⁴—and, therefore, even if they constituted "collective bargaining" with respect to employees *other than Plaintiffs* in "bargaining-units" *other than the community colleges*, with respect to Plaintiffs these activities were "political".³⁵⁵

The UTP's defense fails for another legal reason, too. To prevail, the UTP had to show with clear and convincing *quantitative* evidence that it predominantly engages in "collective-bargaining" [86] activities, or in "politics" that properly "relates" thereto.³⁵⁶ The obvious and necessary

³⁵⁴ PRS Nos. 49-50.

³⁵⁵ *Ante*, pp. 58-65.

³⁵⁶ Plaintiffs can prove that the UTP is a predominantly political organization by showing that political activism is *substantial* or

predicate for such a demonstration, though, is the ability to isolate and identify its activities, and attribute their costs to goals that are "political" or "bargaining" in nature. If the UTP could not perform this task, it could not carry its burden of proof.³⁵⁷ And its own witnesses conceded that this task was impossible of performance, at least with the financial documents and materials the UTP sought to introduce at trial.³⁵⁸

More importantly, if "exclusive representation" as applied in the community colleges must be the *least*-restrictive alternative, then the UTP had to establish its "collective-bargaining" defense not the *least* degree below the level of

essential, in its own view, to the achievement of its goals. This showing, however, need not be quantitative. See Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *De Paul L. Rev.* 293, 344-46 (1978). Conversely, to prove its defense of predominant involvement in "collective bargaining", the UTP must actually quantify its activities. To prove Plaintiffs' contentions, after all, statements of the UTP in its own documents about its substantial or essential involvement in political activism constitute *admissions* against its interest (outside the normal rules of hearsay), and are admissible evidence (without more) of its predominantly political character. Mere statements of the UTP denying its substantial or essential involvement in politics, claiming substantial or essential involvement in "collective bargaining", or purporting to characterize its "political" activities as "related to collective bargaining", on the other hand, are simply self-serving, in most cases are inadmissible hearsay, and (in any event) are conclusory. See *Pennsylvania R.R. v. Chamberlain*, 288 U.S. 333, 339-40 (1933). Certainly, such statements are not binding against Plaintiffs. See, e.g., *Jefferson Savings & Loan Ass'n v. Lifetime Savings & Loan Ass'n*, 306 F.2d 21, 23-24 & n.4 (9th Cir. 1968); *Jerrold Electronics Corp. v. Westinghouse Broadcasting Co., Inc.*, 341 F.2d 653, 666 (9th Cir. 1965).

³⁵⁷ CFF at 2.

³⁵⁸ PFF Nos. 151-53.

clear and convincing evidence, from the perspective of the discipline qualified to make such a judgment. In this instance, [87] because the UTP's task was to quantify its "political" and "collective-bargaining" activities, that discipline is accountancy. If Plaintiffs showed that the UTP's defense is defective according to the analytical principles and methodologies of accounting, and the UTP failed to rebut this demonstration with clear and convincing evidence, then Plaintiffs' case on the UTP's predominantly political character became conclusive; and "exclusive representation" falls under the least-restrictive-alternative standard. Plaintiffs' expert-witness in accounting testified without contradiction that NEA's, MEA's, and MCCFA's financial documents and other materials did not and could not quantify the UTP's activities under the rubrics "politics" and "collective bargaining"; and the UTP's own witnesses concurred in this judgment.³⁵⁹ in the absence of *expert*-testimony to the opposite effect, no *clear and convincing* evidence exists upon which to support a findings at odds with the judgment of Plaintiffs' expert. And, therefore, this Court should have found as an ultimate fact that the UTP did not prove its "collective-bargaining" defense.

In short, the least-restrictive-alternative standard of First-Amendment jurisprudence mandates that Plaintiffs prevail on the issues of (i) the equivalence of PELRA (as applied in the community colleges) to NIRA and BCCA; (ii) the integration of MCCFA, MEA, NEA, IMPACE, and NEA-PAC in the UTP; and (iii) the predominantly political character of the UTP—if Plaintiffs have adduced merely the least-complete, scientifically satisfactory case establishing these facts. Self-evidently, un rebutted testimony from highly qualified expert-witnesses in each of the scientific disciplines peculiarly relevant to [88] analysis of these issues constitutes far more than the *least*-complete, scientifically satisfactory case. Plaintiffs adduced such testi-

³⁵⁹ *Id.* Nos. 145-54, 158-60.

mony, in one instance with full corroboration from an expert-witness for the Defendant State Officials. Therefore, as a matter of law, this Court should have found ultimate facts consistent with this testimony, and, having failed to do so, must now amend its findings accordingly.

B. This Court's findings with respect to the integrated nature of the United Teaching Profession, and its predominantly political character, rest on no discernible, or on erroneous, legal standards.

Purported findings of fact that rest on erroneous legal standards are worthless.³⁶⁰ Here, this Court's findings with respect to the integrated nature of the UTP, and its predominantly political character, suffer from that deficiency in at least three particulars. First, with respect to both issues, the Court fails to give controlling effect to the parties' stipulations that MCCFA, MEA, NEA, IMPACE, and NEA-PAC are integrated in the UTP, and that the UTP is essentially and substantially involved in political activism. Second, with respect to the issue of the UTP's integration, the Court articulates no legal principle at all—[89] and the legal principles that do apply demonstrate beyond cavil that the UTP is integrated. Third, with respect to the issue of the UTP's predominantly political character, the Court adopts a legal standard patently erroneous under *Abood*.

³⁶⁰ See, e.g., *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-44 (1960); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948); *Parke-Davis & Co. v. Stromsodt*, 411 F.2d 1390, 1394 (8th Cir. 1969); *Municipal Bond Corp. v. Commissioner*, 341 F.2d 683, 686 (8th Cir. 1965) (*Van Oosterhout, Blackmun, & Mehaffy, JJ.*); *Friedman v. Fordyce Concrete, Inc.*, 362 F.2d 386, 387-88 (8th Cir. 1966); *Minneapolis, St. P. & S. St. M.R.R. v. Metal-Matic, Inc.*, 323 F.2d 903, 912 (8th Cir. 1963) (*Vogel, Blackmun, & Ridge, JJ.*); *Manning v. M/V "Sea Road"*, 417 F.2d 603, 607 (5th Cir. 1969); *MacMullen v. South Carolina Elec. & Gas Co.*, 312 F.2d 662, 670 (4th Cir. 1963).

1. This Court's purported finding that the United Teaching Profession is not integrated is erroneous as a matter of law.

This Court claims to find that "MCCFA, MEA and NEA are not a single integrated organization", and that "IMPACE and NEA-PAC are also not part of any single integrated organization".³⁶¹ The supposed "facts" on which it bases this conclusion, however, either are false or misleading, or (when correctly analyzed) demonstrate integration, not separateness.³⁶² Conspicuous by its absence in the Court's findings, furthermore, is any statement of a legal principle on the basis of which one can infer from the actually factual findings that the UTP is integrated *vel non*. The findings simply recite a few, carefully selected "facts"—without explaining why these isolated "facts" are relevant to the issue of integration (let alone the Court's ultimate conclusion thereupon), or why the great mass of other, *real* facts that the record contains and the Court ignores is somehow impertinent to the question.

In particular, by its silence the Court pretends that the parties did not stipulate—as they did, again and again—that MCCFA, MEA, NEA, IMPACE and NEA-PAC are integrated in the UTP.³⁶³ And, although it claims that "we carefully [90] reviewed * * * the stipulations of fact",³⁶⁴ by its ultimate conclusion the Court either exposes the falsity of that claim, or admits that it has refused to give those stipulations the controlling effect to which they are entitled. Moreover, by its silence the Court pretends that whatever legal principles one, working backwards, might induce from

³⁶¹ CFF at 8.

³⁶² *See post*, pp. 168-93.

³⁶³ PRS Nos. 405-1132.

³⁶⁴ CFF at 1.

its findings on the issue of integration are valid and generally recognized as such—when, in fact, the only legal principles of integration that either the parties or this Court ever adduced are utterly inconsistent with the Court's ultimate conclusion that the UTP is not integrated.

a. This Court had a duty to adopt the stipulations of the parties that the United Teaching Profession is an integrated organization.

Throughout the course of these proceedings, this Court has exerted great pressure on the parties to stipulate to the material facts in the case.³⁶⁵ And, in response to the Court's direction, the parties did prepare numerous stipulations on the issue of the integration of MCCFA, MEA, NEA, IMPACE, and NEA-PAC in the UTP.³⁶⁶ In its findings, however, the Court simply disregards these stipulations—apparently because it dislikes the ultimate conclusion to which they [91] compel the unbiased mind of any reasoning reader: namely, that the UTP is, by its own admission, fully integrated at every level. For this reason alone, the Court's findings are unlawful.

Evidence is not necessary where the parties stipulate to the material facts.³⁶⁷ Indeed, stipulations “are to be considered facts * * * without further evidence”,³⁶⁸ “facts [which] will be deemed to have been conclusively established”.³⁶⁹ A stipulation of fact is equivalent to the “clear-

³⁶⁵ See, e.g., Order of 4 April 1979, ¶ 1; Order of 15 May 1980.

³⁶⁶ PRS Nos. 405-1132.

³⁶⁷ See *Emmanuel v. Omaha Carpenters Dist. Council*, 560 F.2d 382, 384 (8th Cir. 1977) (Heaney, J.).

³⁶⁸ *United States v. Sommers*, 351 F.2d 354, 357 (10th Cir. 1965).

³⁶⁹ *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1977).

est proof",³⁷⁰ and "has the force of a finding".³⁷¹ Moreover, a stipulation as to an ultimate fact implies every "necessary subsidiary fact",³⁷² and "may be taken with all * * * the inferences legitimately to be drawn" from it.³⁷³ A stipulation, of [92] course, is *binding* and *conclusive* on the party making it,³⁷⁴ even if purportedly conflicting evidence arises at trial,³⁷⁵ or if it controverts contentions of that party's coun-

³⁷⁰ *Schlemmer v. Provident Life & Acc. Ins. Co.*, 349 F.2d 682, 684 (9th Cir. 1965); *Gambill v. United Staets*, 276 F.2d 180, 181 (6th Cir. 1960).

³⁷¹ *Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 589 F.2d 974, 977 (9th Cir. 1978).

³⁷² *United States v. Spann*, 515 F.2d 579, 582-83 (10th Cir. 1975).

³⁷³ *FTC v. Pacific States Paper Trade Ass'n*, 278 U.S. 52, 61 (1927).

³⁷⁴ *E.g.*, *Andrews v. St. Louis Joint Stock Land Bank*, 127 F.2d 799, 804 (8th Cir. 1942); *Hooker Chems. & Plastics Corp. v. United States*, 591 F.2d 652, 665 (Ct. Cl. 1979); *Air-Exec, Inc. v. Two Jacks, Inc.*, 584 F.2d 942, 944 (10th Cir. 1978); *United States v. Sherman*, 576 F.2d 292, 296 (10th Cir. 1978); *E. H. Boly & Sons, Inc. v. Schneider*, 525 F.2d 20, 23 & n.5 (9th Cir. 1975); *Thrash v. O'Donnell*, 448 F.2d 886, 889 n.7 (5th Cir. 1971); *John McShain, Inc. v. United States*, 375 F.2d 829, 831 (Ct. Cl. 1967); *Mull v. Ford Motor Co.*, 368 F.2d 713, 715-16 (2d Cir. 1966); *McNamara v. Miller*, 269 F.2d 511, 515-16 (D.C. Cir. 1959); *United States v. Kahriger*, 210 F.2d 565, 571 (3d Cir. 1954); *Hard v. Stevens*, 65 F.R.D. 637, 639-40 (E.D. Pa. 1975); *City of Lakeland, Florida v. Union Oil Co. of California*, 352 F. Supp. 758, 768 (M.D. Fla. 1973); *Peter Pan Seafoods, Inc. v. United States*, 272 F. Supp. 888, 890-91 (W.D. Wash. 1967); *General Construction Co. v. Hering Realty Co.*, 201 F. Supp. 487, 492-93 (E.D.S.C. 1962); *United States v. Fallbrook Public Utility Dist.*, 165 F. Supp. 806, 821-22 (S.D. Cal. 1958).

³⁷⁵ *E.g.*, *Leizerowski v. Eastern Freightways, Inc.*, 514 F.2d 487, 490 (3d Cir. 1975); *Ringling Brothers-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 199 F.2d 584, 586 (9th Cir. 1941).

sel.³⁷⁶ Even more importantly, “courts are bound to enforce * * * stipulations. Ordinarily courts have no power to make findings contrary to the terms of a stipulation”.³⁷⁷ “The trial court may not disregard the facts stipulated to by the parties”,³⁷⁸ but has a “duty * * * to treat such facts as having been established by the clearest proof”.³⁷⁹

If, therefore, the stipulations between the parties [93] demonstrate—in *haec verba* or by their legitimate inferences—that MCCFA, MEA, NEA, IMPACE, and NEA-PAC are integrated in the UTP, this Court has “no power to make findings contrary to [their] terms”, but instead has a “duty * * * to treat such facts as * * * established by the clearest proof”.³⁸⁰ Such is precisely the situation.

As the italicized language in the following stipulations emphasizes, the UTP has conceded in so many words, again and again, that it is integrated at the local (MCCFA), state (MEA), and national (NEA) levels:

405. *The United Teaching Profession includes local-level affiliates throughout the United States (such as MCCFA), state-level affiliates in each State (such as MEA), and the national-level affiliate in Washington, D.C. (NEA).*

³⁷⁶ *Westinghouse Elec. Co. v. Bulldog Elec. Prod. Co.*, 179 F.2d 139, 141 (4th Cir. 1950).

³⁷⁷ *Burstein v. United States*, 232 F.2d 19, 22 (8th Cir. 1956).

³⁷⁸ *United States v. Sommers*, 351 F.2d 354, 357 (10th Cir. 1965).

³⁷⁹ *Schlemmer v. Provident Life & Acc. Inc. Co.*, 349 F.2d 682, 684 (9th Cir. 1965).

³⁸⁰ Thus, even though the UTP has the burden to show its non-integrated, non-political nature with clear and convincing evidence, stipulations favorable to Plaintiffs on these issues would establish *their* case by such a measure of evidence.

406. NEA considers its local-level affiliates, such as MCCFA, *integral parts of the United Teaching Profession*.

407. As a local-level affiliate of NEA and MEA, MCCFA considers itself an *integral part of the United Teaching Profession*.

408. NEA considers its state-level affiliates, such as MEA, *integral parts of the United Teaching Profession*.

409. As a state-level affiliate of NEA, MEA considers itself an *integral part of the United Teaching Profession*.

To like effect is the sworn testimony of NEA's Executive Director Herndon, that

A. * * * Internally, we assume that *the local affiliate is inseparable from NEA*, so in any given city, * * * the local affiliate is the NEA in that city. * * *

[94] Q. What do you mean, sir, when you use the term inseparable?

A. It means that the members of the Bloomington Education Association are the members of NEA in Bloomington. So, *NEA, in that community, is the same as that local affiliate*.

Q. So, from the point of view of the NEA, both a state organization and a local organization, it will be considered to be *integral parts of a larger group*?

A. Yes.³⁸¹

And the sworn testimony of NEA's President Ryor is in accord.

Q. * * * would you agree * * * that the NEA is a relatively smooth functioning and *integrated organization*

³⁸¹ PRS No. 408a (emphasis supplied).

that operates cooperatively at every one of these levels [i.e., local, state, and national]?

A. Yes.³⁸²

The UTP having thus admitted that it exists,³⁸³ that it consists of MCCFA, MEA, and NEA *inter alia*;³⁸⁴ that MCCFA, MEA, and NEA are its *integral* parts;³⁸⁵ and that it is a single, *integrated* organization³⁸⁶—how can this Court pretend, *sub silentio*, that the UTP does not exist, or “find” that “MCCFA, MEA and NEA are not a single integrated organization”?³⁸⁷ On what basis does this Court “disregard [95] the facts stipulated to by the parties”,³⁸⁸ or “make findings contrary to the terms of [the] stipulation[s]”?³⁸⁹ Because now, having failed to adduce the necessary expert-testimony purporting to show that the UTP’s sub-units are “separate”, the UTP’s attorneys find these admissions not only professionally embarrassing, but also fatal to their clients’ case—and therefore seek surreptitiously to substitute their own ignorant, personal views for the facts they have conceded and that Plaintiffs

³⁸² *Id.* No. 435a (emphasis supplied). The stipulations also quote Ryor as admitting that “[w]e have seen our organization mature into one body, national in scope, with sound and necessary functions at all three levels where we must be strong: national, state, and local”, and that “[w]e are in fact three levels combined into one organization”. *Id.* Nos. 429a, 433a.

³⁸³ *Id.* No. 405.

³⁸⁴ *Id.*

³⁸⁵ *Id.* Nos. 406-09.

³⁸⁶ *Id.* Nos. 429a, 433a, 435a.

³⁸⁷ *CFF* at 8.

³⁸⁸ *United States v. Sommers*, 351 F.2d 354, 357 (10th Cir. 1965).

³⁸⁹ *Burstein v. United States*, 232 F.2d 19, 22 (8th Cir. 1956).

have redundantly proven anyway?³⁹⁰ But these questions are merely rhetorical: For no one doubts that this Court has *no power* to disregard the stipulations, *no power* to “find” facts contrary to the stipulations, and certainly *NO power* to adopt the notions of the UTP’s attorneys as “facts”. And, for that reason, this Court must amend its findings to indicate that MCCFA, MEA, and NEA are integrated in the UTP.

Similarly, the parties’ stipulations conclusively establish that MEA is integrated with IMPACE;³⁹¹ NEA is integrated with NEA-PAC;³⁹² and both IMPACE and NEA-PAC are integrated in the UTP.³⁹³ For example, the stipulations quote the [96] statement of MEA’s President Hill that “the IMPACE operation * * * is an integral part of the MEA organization”,³⁹⁴ recount the “pledge” of IMPACE’s Chairman Klinkerfues that “IMPACE will continue to operate in total conformity with the wishes of the MEA and in total unison with the goals and objectives of the parent organization”,³⁹⁵ and recite the policy of IMPACE that its contributions to candidates depend upon those candidates’ voting-records being “consistent with * * * the policies of

³⁹⁰ *Contrast* PFF at 12-13 n.33 with *Westinghouse Elec. Co. v. Bulldog Elec. Prod. Co.*, 179 F.2d 139, 141 (4th Cir. 1950).

³⁹¹ Even this Court concedes as much when it finds that IMPACE is “MEA’s political action arm”. CFF at 6.

³⁹² Even this Court concedes as much when it finds that NEA-PAC is “NEA’s political action arm”. *Id.* at 7.

³⁹³ As the stipulations discussed immediately heretofore establish that MCCFA, MEA, and NEA are integrated in the UTP; and as this Court finds that IMPACE and NEA-PAC are MEA’s and NEA’s “political action arm[s]”, respectively; it follows that MCCFA, MEA, NEA, IMPACE, and NEA-PAC are integrated.

³⁹⁴ PRS No. 674.

³⁹⁵ *Id.* at 521.

the united teaching profession".³⁹⁶ And again, the stipulations quote the sworn testimony of NEA's Manager of Contacts with Federal Agencies Baker that "NEA-PAC is essentially a bank account" and that "NEA-PAC is a creature of the National Education Association",³⁹⁷ and recite the guideline of NEA-PAC that its "purpose is to support candidates * * * in order to achieve political decisions consistent with the aims of the United Teaching Profession".³⁹⁸ The very "policies" and "guidelines" of IMPACE and NEA-PAC having thus admitted the intimate connexion between those sub-units and the UTP, on the basis of what legal rule, or by what course of reasoning, does this Court "find" that "IMPACE and NEA-PAC are * * * not part of any single integrated organization"?³⁹⁹ But, once more, this question is merely rhetorical, the Court's complete absence of power to make such a "finding" being self-evident. And, for that reason, this Court must amend its findings to [97] indicate that IMPACE and NEA-PAC, together with MCCFA, MEA, and NEA, are integrated in the UTP.

b. This Court's findings fly in the face of the undisputed legal principles of organizational integration.

Not only does this Court refuse to follow the law concerning the binding and conclusive nature of stipulations, but also it disregards the undisputed law concerning what relationships among various organizational sub-units establish their mutual integration. On several occasions, Plaintiffs have presented to this Court their Legal Appendix on Integration,⁴⁰⁰ which collects the basic legal rules of inte-

³⁹⁶ *Id.* No. 519.

³⁹⁷ *Id.* No. 501.

³⁹⁸ *Id.* No. 503.

³⁹⁹ CFF at 8.

⁴⁰⁰ *Ante*, note 9.

gration compatible with the criteria of organizational science.⁴⁰¹ At no time in these proceedings have Defendants—and particularly the UTP—challenged even a single point in this analysis, or constructed an analysis of their own based on legal precedents, the principles of organizational science, or any other identified, rational concepts. Rather, the UTP's tactic has been to say nothing about law or organizational science, and instead to proffer the admittedly incompetent ramblings of its counsel⁴⁰² as the "legal" basis for the "finding" that this Court has now so plainly adopted.⁴⁰³

Even the most cursory consideration of the law of organizational integration, however, proves beyond doubt that the Court's "findings" with respect to MCCFA, MEA, and NEA are [98] without substance. For example, sub-units in an organization may admit their integration by describing themselves, or their activities, as parts of the organization, or its activities.⁴⁰⁴ So much the record shows here, the stipulated facts alone inextricably linking MCCFA and MEA with NEA, according to this legal criterion.⁴⁰⁵ Again, a sub-unit's constitution or by-laws may disclose its ability to control or influence another sub-unit, or its exposure to

⁴⁰¹ *Ante*, note 215.

⁴⁰² *See* PFF at 12-13, n.33.

⁴⁰³ *See* Table, *ante*, pp. 20a-20g.

⁴⁰⁴ LAI at 5 & n.14.

⁴⁰⁵ *E.g.*, PRS Nos. 405-09, 415-17 (MCCFA, MEA, and NEA "integral parts" of UTP); 429a, 433a, 435a (UTP one organization with local, state, and national levels); 453, 454 (UTP's integrated activities); 460-64 (use of affiliate-names signifying integration); 472 (MEA and MCCFA affiliates of NEA); 633-41 (necessity for cooperation among all levels of UTP); 675 (MCCFA "an integral part" of MEA); 694a-99 (integration of local-, state-, and national-level programs).

such control or influence.⁴⁰⁶ And so much stipulations in the record show here for MCCFA, MEA, and NEA.⁴⁰⁷ Again, sub-units are integrated when they have a unified membership- and dues-structure, a unified program-structure, or a governance-structure subsuming all the sub-units under a parent constitution and by-laws.⁴⁰⁸ And so much the stipulations of fact reveal about MCCFA, MEA, and NEA.⁴⁰⁹ Or, in sum, for each legal criterion of integration in Plaintiffs' Legal Appendix on Integration there exists redundant evidence in the stipulations (not to mention the trial-testimony and exhibits) demonstrating that MCCFA, MEA, and NEA are integrated—and *no evidence whatsoever even tending to show that these criteria are not satisfied.*

[99] The Court's "findings" appear no better grounded in law with regard to IMPACE and NEA-PAC. For example, sub-units are integrated when one is the special-purpose "arm" of another, created to serve particular interests of the parent sub-unit.⁴¹⁰ In the cases of IMPACE and MEA, and NEA-PAC and NEA, the stipulations in the record show precisely such a relationship,⁴¹¹ as the Court itself explicitly finds.⁴¹² Again, the law treats "[a]ll of the political committees * * * set up by a membership organization,

⁴⁰⁶ LAI at 6, 11-13.

⁴⁰⁷ *E.g.*, PRS Nos. 473-74, 485-86, 488-91, 494-96, 548-60, 562, 564, 566-68, 594, 606-606a, 611, 615, 616.

⁴⁰⁸ LAI at 9-10, 15.

⁴⁰⁹ *E.g.*, PRS Nos. 439-47 (unified membership); 448-52 (unified dues); 453-54, 694a-99 (unified program); 455-98 (inter-level governance).

⁴¹⁰ LAI at 5, 10-11.

⁴¹¹ *E.g.*, PRS Nos. 477-80, 482-83, 505-11, 514-21, 525-28, 530, 563, 569-70, 573 (IMPACE and MEA); 499, 501-04, 574, 577-79, 581-88, 590 (NEA-PAC and NEA).

⁴¹² CFF at 6 (IMPACE is "political action arm" of MEA), 7 (NEA-PAC is "political action arm" of NEA).

including * * * related State and local entities of that organization * * * as a single political committee”.⁴¹³ This alone establishes the integration of IMPACE and NEA-PAC—to which numerous other stipulated facts also testify.⁴¹⁴ Or, in sum, for each legal criterion of integration in Plaintiffs’ Legal Appendix on Integration there exists redundant evidence in the stipulations (not to mention the trial-testimony and exhibits) demonstrating that IMPACE is integrated with MEA, NEA-PAC is integrated with NEA, and IMPACE is integrated with NEA-PAC—and *no evidence whatsoever even tending to show that these criteria are not satisfied.*

Simply as a matter of law, then, this Court must amend its findings of fact to indicate that MCCFA, MEA, NEA, IMPACE, and NEA-PAC are integrated in the UTP.

[100] 2. *This Court’s purported finding that the United Teaching Profession is not a predominantly political organization is erroneous as a matter of law.*

This Court claims to find that “MEA and NEA are properly characterized as public employee organizations”; that “MCCFA is organized and affiliated with MEA and NEA to pursue similar efforts”; and that, although “[a]ll three organizations engage in a wide range of legislative, governmental and public relations activities”, these activities “are closely and directly related to furtherance of each organization’s collective bargaining activities”.⁴¹⁵ Apparently, the Court means to imply that MCCFA, MEA, and NEA do not—or, more properly, the UTP does not—constitute a political-action, or predominantly political organization. Of course, the conclusion that MEA, NEA, and MCCFA are “properly characterizable as public employee organiza-

⁴¹³ FEC Reg. § 110.3(a) (1) (ii) (D), *quoted in* LAI at 9 n.27.

⁴¹⁴ *E.g.*, PRS Nos. 475-76, 481, 580, 589, 592.

⁴¹⁵ CFF at 12.

tions" does not preclude their characterization, individually or collectively in the UTP, as predominantly political organizations, too.⁴¹⁶ And the record contains no factual support for the conclusion that the UTP's many and varied political activities are "closely and directly related to * * * collective bargaining" in the sense *Abood* uses that phrase.⁴¹⁷ The Court's major error, though, stems from its failure correctly to apply the law of political-action organizations to the UTP, and conclusively to adopt the UTP's own [101] repeated admission of its predominantly political character as set out, again and again, in the parties' stipulations.

A predominantly political organization is one that engages to a substantial degree in such typical political activism as partisan politics, lobbying, propaganda and agitation, political litigation, or political organizing; or one for which involvement in such activism is essential to the achievement of its goals.⁴¹⁸ Because "collective bargaining" in the public sector is "political" in nature,⁴¹⁹ a predominantly political organization can also be one that engages

⁴¹⁶ Under PELRA, an "[e]mployee organization" is "any * * * organization of public employees whose purpose is, in whole or in part, to deal with public employers concerning grievances and terms and conditions of employment". Minn. Stat. § 179.63, subd. 5 (emphasis supplied). Obviously, under this definition, an organization could simultaneously be both an "employee organization" and a political-action organization.

⁴¹⁷ See *post*, pp. 193-221.

⁴¹⁸ Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 323-49 (1978). The legal analysis and authorities contained in this article constitute the sole body of law on the subject of predominantly political organizations that any of the parties has presented to this Court. The Court itself has said nothing on the subject.

⁴¹⁹ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 227-33 (1977) (opinion of Stewart, J.).

to a substantial degree in such bargaining.⁴²⁰ However, with respect to those employees in a particular "bargaining-unit", direct involvement in "collective bargaining" for that unit, or in political activity "related to collective bargaining" in the sense of being "an integral part of the bargaining process" in that unit,⁴²¹ constitutes a defense to any such employee's claim that he is unconstitutionally forced to associate with a [102] political-action organization as a condition of public employment.⁴²²

The record contains a plethora of stipulations admitting that the UTP has been, and is, substantially and essentially involved in lobbying,⁴²³ propaganda and agitation,⁴²⁴ politi-

⁴²⁰ The possible essentiality of "collective bargaining" is not relevant here, because the record shows that the UTP existed in the same basic form as it does today before PELRA extended "meet-and-negotiate" privileges to community-college faculty in Minnesota. PFF at 58 n.223.

⁴²¹ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977) (opinion of Stewart, J.).

⁴²² Thus, even if MCCFA were truly separate from the UTP, and itself engaged in no "political" activity except "meet[ing] and negotiat[ing]" under PELRA, it would nevertheless be a predominantly political organization. Under those circumstances, however, PELRA would not violate the rule of *Branti v. Finkel*, — U.S. —, —, 100 S.Ct. 1287, 1293-95 (1980), although it would still be unconstitutional as applied for other reasons.

⁴²³ *Substantiality*: PRS No. 1471-81, 1523-36 (statements of NEA); 1482-1504, 1537-43 (statements of MEA); 1505 (statement of MCCFA); 1506-22 (adoptive admissions). *Essentiality*: *id.* Nos. 1453-57 (statements of NEA); 1459a, 1461-64 (statements of MEA); 1468-69, 1626 (statements of MCCFA).

⁴²⁴ *Id.* Nos. 1544-45 (statements of NEA); 1546-51, 1556 (statements of MEA); 1552-52a, 1628 (statements of MCCFA).

cal litigation,⁴²⁵ and political organizing.⁴²⁶ And the UTP has also stipulated that, as far as NEA⁴²⁷ and MEA⁴²⁸ are concerned, essentially none of this activity has any relationship to “meet[ing] and negotiat[ing]” on behalf of community-college faculty (such as Plaintiffs) in Minnesota, in the sense of being “an integral part of the bargaining process” in the colleges. From these stipulations alone, binding and conclusive as they are on both the UTP and this Court,⁴²⁹ the Court should have found that the UTP is a [103] predominantly political organization, and that its involvement in “collective bargaining” (whatever that may be) outside of the community colleges is no defense to Plaintiffs’ First-Amendment claims.

Moreover, and decisively, even if the record did show what it does not and can not: namely, that a substantial portion of the UTP’s lobbying, propaganda and agitation, political litigation, and political organizing is properly “related to collective bargaining” under *Abood*—even then, the UTP would still be a predominantly political organization with no defense to Plaintiffs’ claims. For the UTP has stipulated, again and again, that involvement in *partisan politics* is essential to the achievement of its goals.⁴³⁰ As a matter of law under *Abood*, involvement in partisan politics

⁴²⁵ *Id.* Nos. 1557-58, 1561.

⁴²⁶ *Id.* Nos. 1562-64 (statements of NEA); 1565-79 (statements of MEA); 1580, 1624, 1626-28 (statements of MCCFA); 1593-1610 (examples of political organizing at local, state, and national levels).

⁴²⁷ *Id.* No. 49.

⁴²⁸ *Id.* No. 50.

⁴²⁹ *Ante*, notes 367-79 & accompanying text.

⁴³⁰ PRS Nos. 1188-1303. Plaintiffs’ expert-witness in political science concurred in the UTP’s assessment of its position. *See* PFF Nos. 114-15.

is *not* "related to collective bargaining".⁴³¹ And, therefore, the UTP is constitutionally unfit to serve (through MCCFA) as "exclusive representative" in the colleges.⁴³²

[104] Involvement in partisan-political activism is "essential" to an organization when, in the organization's own, subjective view, its goals require such involvement.⁴³³ The record contains stipulation after stipulation recording the UTP's view that its continuing, substantial involvement in partisan politics at every level and in every branch of government is essential. For example, the stipulations overflow with invocations of the slogan "every educational decision is a political decision",⁴³⁴ as a justification for intervention in partisan politics by the UTP:

No. 1188. * * * Since every decision which we live by, teach by, is a political decision determined by elected politicians, we must begin to influence the forces which

⁴³¹ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-37 (opinion of Stewart, J.); 24 (Stevens, J., concurring); 254 (Powell, J., concurring in the judgment) (1977). *See ante*, note 66 & accompanying text.

⁴³² As would be the Democratic or Republican Party if it set up "collective-bargaining arms" and sought to qualify as an "employee organization" under PELRA. In that case, the Party would be essentially involved in partisan politics, on the one hand, and (for purposes of argument) substantially involved in "bargaining", on the other. Its involvement in partisan politics, though, would disqualify it for participation in "bargaining"—rather than, as this Court implies, its "bargaining" immunizing it from attack because of its political activities. *Cf. American Communications Ass'n v. Douds*, 339 U.S. 382, 388-405 (1950); *National Maritime Union v. Herzog*, 78 F. Supp. 146 (D.D.C. 1948) (three-judge court); *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949).

⁴³³ *E.g., Haswell v. United States*, 500 F.2d 1133, 1137 (Ct. Cl. 1974).

⁴³⁴ On the origin of this slogan, *see* PFF at 52-53 n.192.

control our functions, our finances, and our futures.
 * * * ⁴³⁵

No. 1189. * * * [the entry of NEA * * * directly into politics—contributions, endorsing presidential candidates, trying to get teacher delegates to party conventions is] the beginning of real power among teachers. * * * [I]t reflects their understanding of the fact that everything they do in their life is affected by a political decision * * * .⁴³⁶

No. 1190. * * * every issue affecting public education finds its solution in some political setting, either a local, county government or a state government, or here at the federal level, so we will be increasing our participation at all of those levels in the decision-making.⁴³⁷

No. 1191. * * * Virtually every decision affecting the professional lives [105] of educators * * * is a political decision. Crucial determinations such as those about education's future are made by elected or appointed officials at all levels of government. Politicians make the major, crucial decisions affecting education.⁴³⁸

No. 1192. * * * members will help us to maintain and expand our current level of political activity. This is crucial because every educational decision is really a political decision.⁴³⁹

⁴³⁵ Remarks of NEA's President in 1970. See PRS No. 1199a.

⁴³⁶ Remarks of NEA's President in 1975.

⁴³⁷ Remarks of NEA's President in 1978.

⁴³⁸ From an article by one of NEA's Political-Education Specialists.

⁴³⁹ From a directive of the Chairman of MEA's Governmental Relations Council in 1975.

No. 1194. * * * Education and politics do mix * * *. I have repeatedly said that every educational decision is a political decision. The future of this great profession lies in its ability to influence those political decisions * * *.⁴⁴⁰

No. 1195. * * * ours is a profession in which every major decision of significance is a political decision.⁴⁴¹

No. 1196. * * * It has been said that every educational decision is a political decision. Each year the truth of this statement becomes more and more obvious. And each year the association becomes more effective and more involved in the political process.⁴⁴²

No. 1200. * * * NEA affirmatively believes that all decisions in education are political decisions.⁴⁴³

No. 1202. * * * we have seen demonstrated the crucial importance of a pro-education Congress * * *. However, the fact is that supporters of education * * * should not have to scramble every year [106] just to stay even. Never has there been a more dramatic illustration of why NEA has for the first time endorsed a candidate for President [of the United States]. Friends in Congress are not enough. We must have a team in the White House which is committed to making education a top national priority * * *.⁴⁴⁴

No. 1203. * * * [T]he nation's teachers intend to make a difference in presidential politics.

⁴⁴⁰ Remarks of MEA's Executive Director in 1975.

⁴⁴¹ From an editorial by IMPACE's Chairman in 1976.

⁴⁴² From an article by MEA's Executive Director in 1976.

⁴⁴³ Sworn testimony of NEA's Director of Government Relations.

⁴⁴⁴ Remarks of NEA's President in 1976.

It is not enough to have friends on Capitol Hill. The actions of the White House have affected critically the course of American education—through presidential vetoes, court appointments and other actions that reveal federal priorities.⁴⁴⁵

No. 1204. * * * [W]e will finally learn by heart the history lesson that we cannot remain aloof from politics at any level. For it is the President [of the United States] who appoints the justices [of the Supreme Court], and it is the justices who can make—and unmake—these decisions.⁴⁴⁶

Statements such as these reflect the UTP's judgment that it *must* be involved in partisan-political activism at every level of government, including the election or appointment of city councils, local school boards, state boards of education, state legislatures, state governors, Congress, the President of the United States, and the Justices of the Supreme Court!⁴⁴⁷ And the record overflows with even more stipulations to the same effect, at the national (NEA),⁴⁴⁸ state (MEA),⁴⁴⁹ and local (MCCFA)⁴⁵⁰ levels of the UTP, and from the national- [107] level (NEA-PAC)⁴⁵¹ and state-level (IMPACE)⁴⁵² "political-action arms", too. Even lowly MCCFA, the one UTP sub-unit actually involved in "meet[ing] and negotiat[ing]" in the community colleges, has

⁴⁴⁵ From an editorial by MEA's Executive Director in 1976.

⁴⁴⁶ Remarks of NEA's President in 1976. *See* PRS Nos. 1205.

⁴⁴⁷ *E.g.*, PRS Nos. 1198, 1299, 1206a.

⁴⁴⁸ *Id.* at 1224-50.

⁴⁴⁹ *Id.* at 1251-80.

⁴⁵⁰ *Id.* at 1294-1302.

⁴⁵¹ *Id.* at 1281-83.

⁴⁵² *Id.* at 1284-93.

repetitively stated—by official organizational resolution, no less—that “political action * * * is paramount”.⁴⁵³ Not simply “essential”, but *paramount*! If these do not constitute overwhelming admissions that the UTP is essentially involved in partisan politics, and therefore is a predominantly political organization, then Plaintiffs cannot imagine what admissions could convince this Court of a fact that the UTP broadcasts nationwide to anyone and everyone with ears to hear, eyes to read, and the wit and unbiased judgment to believe what their ears and eyes tell them.

In short, the UTP has stipulated that involvement in partisan-political activism is essential to the achievement of its goals. This stipulation is binding and conclusive, and *compels* this Court to find that the UTP is a predominantly political organization. Because partisan-political activism is not “related to collective bargaining” under *Abood*, this stipulation also *compels* this Court to reject the UTP’s purported “collective-bargaining” defense—and, therefore, to conclude that it is a political-action organization, pure and simple. Accordingly, this Court should amend its findings of fact.

[108] C. This Court’s findings with respect to the United Teaching Profession’s predominantly political character do not rest on clear and convincing evidence.

In purporting to find that MCCFA, MEA, and NEA are not predominantly political organizations (or that their political activities supposedly “relate to collective bargaining” in some permissible sense), this Court explicitly bases its conclusion “on the testimony of numerous officers and staff of MCCFA, MEA and NEA concerning the character of their political activity and the proportion of their time spent on political activity of any kind, in addition to the

⁴⁵³ *Id.* at 1298-1301.

many exhibits relating to budget allocations of each organization".⁴⁵⁴ Nowhere does the Court recite any of this "testimony", or refer specifically to any of the "exhibits relating to budget allocations"—let alone explain how this "testimony" and these "exhibits" satisfied the standard of proof required in this case. But the reason for the Court's silence on the subject is obvious: In no instance did the "testimony" and "exhibits" provide substantial evidence, a preponderance of the evidence, or (certainly) clear and convincing evidence in support of the UTP's claims; and, in most instances, the "testimony" and "exhibits" amounted to *no* evidence at all, being inadmissible under the Federal Rules of Evidence.

No one can deny that the standard of proof in this First-Amendment case is *clear and convincing evidence*.⁴⁵⁵ This Court assigned to the UTP the burden of proving its non-political [109] character.⁴⁵⁶ Therefore, for the UTP to prevail, the "testimony" of its officials and staff-personnel and its "exhibits" concerning the organization's political involvement, and the level and nature of that involvement, had to provide "clear and convincing proof";⁴⁵⁷ proof with

⁴⁵⁴ CFF at 12.

⁴⁵⁵ *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50-52 (1971) (opinion of Brennan, J.); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82-83 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th cir. 1981); *Bruns v. Pomerleau*, 319 F. Supp. 58, 66 (D. Md. 1970). *See* *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276-77 (1971).

⁴⁵⁶ CFF at 2 & n.1.

⁴⁵⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

"convincing clarity";⁴³⁸ "clear and compelling" facts;⁴³⁹ "clear, unequivocal, and convincing" testimony, "that class of evidence which commands respect, and that amount of it which produces conviction";⁴⁴⁰ in short, "clear and unequivocal" proof, "that solidity of proof which leaves no troubling doubt".⁴⁴¹ Whether a reasoning man could have concluded from its "testimony" and "exhibits" that the UTP is predominantly non-political in character, Plaintiffs doubt. In any event, in cases under the clear-and-convincing-evidence standard, courts "are not concerned with * * * whether a reasonable man might so conclude"⁴⁴²—but instead demand evidence "which does not leave the issue in doubt", evidence "substantially identical with * * * *proof beyond a reasonable doubt*".⁴⁴³

[110] This Court does not say that the UTP's "testimony" and "exhibits" furnished such "clear", "convincing", "unequivocal", or "compelling" proof of the UTP's

⁴³⁸ *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82-83 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

⁴³⁹ *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967).

⁴⁴⁰ *Maxwell Land-Grant Case*, 121 U.S. 325, 381-82 (1887).

⁴⁴¹ *Baumgartner v. United States*, 322 U.S. 665, 670 (1944). *Accord*, *Schneiderman v. United States*, 320 U.S. 118, 125, 135, 136 (1945).

⁴⁴² *Schneiderman v. United States*, 320 U.S. 118, 153 (1943).

⁴⁴³ *Klapprott v. United States*, 335 U.S. 601, 612 (1949). *Accord*, *id.* at 617 & n.2 (Rutledge, J., concurring in the result), *citing Schneiderman v. United States*, 320 U.S. 118, 125, 136, 153, 154, 158, 159 (1943), *and Knaur v. United States*, 328 U.S. 654, 657 (1946) (concurring opinion). The Supreme Court applied the *Schneiderman* standard in a First-Amendment context in *Pennekamp v. Florida*, 328 U.S. 331, 347-48 (1946). *But cf. in the special context of obscenity Cooper v. Mitchell Bros.' Santa Ana Theater*, — U.S., — 102 S.Ct. 172 (1981).

allegedly non-political character. Neither could it have said so. For no reasoning individual could examine the record in this case and honestly conclude that the UTP had adduced even "substantial evidence" defining its political involvement, let alone a preponderance of the evidence, or clear and convincing evidence approaching proof *beyond a reasonable doubt*.⁴⁰⁴

In substance, the UTP's case divided itself into three parts: namely, (1) testimony and exhibits concerning the budgetary allocations of its various levels, together with NEA's fraudulent "rebate procedure"; (2) testimony purporting to survey the general activities of NEA, MEA, and MCCFA; and (3) testimony from various UTP officials and staff-personnel (particularly UniServ Directors in Minnesota) concerning how they supposedly have allocated their working-time on behalf of the UTP. Rather than proving the UTP's contentions, though, the testimony relating to budgetary allocations established that the UTP's "many exhibits" were incompetent to identify, differentiate, and (most importantly) quantify its activities in the two categories "politics" and "collective bargaining". And the testimony relating to NEA's "rebate procedure", on the one hand, was inadmissible as against Plaintiffs because the witness admitted to no personal knowledge of the "rebate" calculation; and, on the other hand, constituted an admission as against the UTP that the "rebate" was defective, if not fraudulent, in numerous particulars. Again, the testimony purporting to describe the general programs of NEA, MEA, and MCCFA was [111] inadmissible as against Plaintiffs because the witnesses admitted to no, or little, personal knowledge of the facts about which they purported to testify. And finally, the testimony

⁴⁰⁴ Even "substantial evidence" in support of the UTP's pretensions would not salvage this Court's "findings" from the "clearly-erroneous" scrap-heap. *See ante*, note 161. Such "substantial evidence", of course, does not exist. *See post*, pp. 193-221.

of the various UTP officials and staff-personnel, if admissible, was not worthy of belief because, where it did not consist of falsehoods, mere guesses, and references to administrative duties not defined in terms of "politics" or "collective bargaining", it purported to contradict the parties' stipulations and the UTP's own comprehensive Uni-Serv survey.

- 1. Rather than constituting clear and convincing evidence of the United Teaching Profession's contentions, the testimony of its witnesses proved that its exhibits were incompetent to show the extent of its activities either in "politics" or in "collective bargaining".**

The UTP's "many exhibits relating to budget allocations" constituted two sets. First, financial statements and other more-or-less routine accounting-documents summarizing the yearly expenditures of the various sub-units MCCFA, MEA, and NEA according to arbitrary "program" or "line-item" entries, but *not* according to the categories "politics" or "collective bargaining". And second, a special "rebate procedure", separate from its normal financial documents, by which NEA claimed to determine the amount of its budget it expended on "political activity 'unrelated to collective bargaining' ". As the testimony of the UTP's own witnesses established, however, none of these "exhibits" provided clear and convincing proof—or, in most instances, *any* proof—of how much of the UTP's operations involved "politics", as opposed to "collective bargaining".

- [112] a. The United Teaching Profession's own witnesses conceded that its financial exhibits did not and could not segregate the organization's activities into the two categories "politics" and "collective bargaining".**

The UTP offered three witnesses to testify on what the Court calls the organization's "many exhibits relating to budget allocations": NEA's Deputy Executive Director

Dunn, MEA's Business Manager Brunell, and MCCFA's President Durham. *Each of these witnesses admitted, under oath, that not one of the "many exhibits relating to budget allocations" was designed for the purpose or was capable of breaking down the activities of NEA, MEA, or MCCFA into the categories "politics" and "collective bargaining".*⁴⁶⁵ And Plaintiffs' expert-witness in accounting testified, without challenge, to the same conclusion.⁴⁶⁶

Yet, if the UTP had the burden of proving with clear and convincing evidence the extent and nature of its "political" activities; if this burden logically requires the identification, separation, and quantification of those "political" activities, as distinguished from its "collective-bargaining" activities; and if the UTP's own witnesses conceded that its "many exhibits relating to budget allocations" *did not and could not* identify, separate, and quantify its activities in the two relevant categories—then, with NO EVIDENCE speaking to the subject, how can this Court legally or even rationally claim that the "many exhibits" support the UTP's contentions *at all*, let alone with "substantial evidence", a preponderance of the evidence, clear and convincing evidence, or (especially) proof [113] *beyond a reasonable doubt*?! How can this Court purport, *sub silentio* and by implication, to "find" such "compelling" and "unequivocal" evidence when the UTP's own witnesses at the national, state, and local levels candidly admitted that the "exhibits" contained NO proof of what the UTP must prove?! Is *no proof* equivalent to *proof beyond a reasonable doubt*?! Hardly: "When a party's own testimony * * * would defeat his right to a verdict, * * * a verdict should be directed against him."⁴⁶⁷

⁴⁶⁵ PFF Nos. 151 (Dunn), 152 (Brunell), 153 (Durham). On the peculiar nature of Durham's testimony, see *id.* at 70 n.264.

⁴⁶⁶ *Id.* Nos. 145-53.

⁴⁶⁷ *Luther v. Loewi & Co., Inc.*, 549 F.2d 1173, 1175 (8th Cir. 1977) (Heaney, Ross, & Stephenson, JJ.).

Only this Court knows why, with testimony from the UTP's own witnesses conceding that the organization's "many exhibits relating to budget allocations" supplied no proof of what the UTP needed to prove, the Court chose to "find" in the UTP's favor anyway in part on the basis of those incompetent "exhibits". Plaintiffs must assume that, in its "carefu[l] revie[w of] the trial record",⁴⁰⁸ the Court somehow overlooked the dispositive testimony of the UTP's witnesses. Plaintiffs therefore respectfully direct the Court's attention, for purposes of illustration, to the following testimony of MEA's Business Manager Brunell:

Q. * * * What do you call these, [UTP] Exhibit 208, what's the generic name for this type of document?

A. The total Exhibit 208 would be the financial statements of the MEA, comprised of one, the balance sheet and two, income and expense statement.

Q. Now, if * * * you were to take this document and I were to give you * * * definitions of activities and ask you to go through this document and determine the extent to which those activities had been [114] engaged in by any of the staff personnel of MEA—or let me put it this way, that's the exercise I want you to go through with me now. Do you know what I'm asking you to do?

A. Yes.

Q. You tell me if it possible * * * on the basis of * * * dollar amounts and whether those dollar amounts were determined by percentage of time or whatever accounting criteria you have, I want you to tell me if I give you a definition of an activity whether you can take documents of the kind exemplified by [UTP Exhibit No.] 208 and go through and pull all of the dol-

⁴⁰⁸ CFF at 1.

lar amounts expended on those activities, okay? Do you understand?

- A. Yes, I understand what you are saying. I would have to have your definition.
- Q. Definition number one, any financial or other support that was directed towards aiding or assisting people to participate in the activities of political parties such as precinct caucuses, State, County, National conventions. Will you go through this and pull out every dollar that was connected with that in the years those party's activities had taken place?
- A. With the financial statement and accounting system that we use it's not possible to do that.
- Q. All right. Let's say * * * aiding in any way the campaigns of candidates for elections for public office * * *. Could you go through the appropriate financial documents, * * * exemplified in Exhibit 208 and tell me how much money was expended on that kind of activity?
- A. Again, the same answer, not possible with the way we have our accounting set up.
- Q. Let's say * * * lobbying, any attempt to influence a Legislator, or Administrator or member of the Executive Branch of the government by contacting him or his staff persons, people connected with his office. That's the definition. Could you go into these financial documents and pull out all the expenditures connected with that?
- A. I would say in the area of lobbying * * * we could come much closer because we have a department called Governmental Relations which spends most of its time in that activity. In that one area it would be more possible.

[115] Q. And that's because you happen to have a segment of the line item budget that you know is directed to lobbying?

A. Yes.

Q. But you are aware, are you not, that people, for instance, from the [Instruction and Professional Development] and from [the] Negotiations [Departments of MEA] from time to time become involved in lobbying activities?

A. Yes.

Q. And those people are not found in the lobbying category in these budgets, are they, or their expenditures are not found in those categories?

A. Their expenditures are found in their own relative department.

Q. The extent to which those people or people from Teacher's Rights might be involved in lobbying, you couldn't determine from the Exhibit 208, could you?

A. No, we could not.

Q. Let's say now we talk about litigation. I'm going to define this [as] litigation [the] purpose of which is to change a law or establish a precedent. All right?

A. Okay.

Q. Could you go into these documents and tell me how much money was expended on the various staff people of MEA on such litigation each year?

A. Not from the accounting documents presented here.

Q. Let's say I talk about public relations and by public relations I mean any attempt to go out and reach any part of the general public to try and influence those people in a way favorable to MEA.

A. Okay.

Q. Could you go into these financial documents and tell me how much money was expended * * * on those activities by all the MEA staff?

A. Again, I would respond in the same way I did with lobbying. I think that we do have a category of public relations. In that case it would be easier to do that.

[116] Q. But you are aware, for instance, that the UNISERV Directors will receive monies from MEA as MEA employees engaged in activities in various local Associations that are related to public relations as I have defined them?

A. Yes.

Q. And you couldn't tell that amount out of this financial document, could you?

A. No.

Q. Let's say now I go to another category and I define this as all of the activities in MEA that are designed to train or recruit or bring people into activities related to political parties [,] related to candidates, related to lobbying, related to public relations. Could you tell me how much of that organizing-type activity in those categories?

A. Not from these documents, we could not.

Q. So, I take it then there are some documents, shall we call them backup documents, documents at a greater level of detail from which some of these determinations might be made?

A. Yes, that's possible, yes.

Q. Now, what kinds of accounting documents, documents your office deals with fall into the category of backup documents?

A. Well, I think the normal things like paid vouchers, expense vouchers, detail documents that would support the entries on these accounting records.

Q. And who maintains those?

A. Those are maintained in my office.

Q. And you get those from the various people in the staff departments?

A. Yes.

Q. As they spend monies, they send you vouchers, expense forms?

A. Yes.

Q. I take it those vouchers and expense forms don't always detail specifically what every individual has actually done. Can you tell from looking at all of those vouchers and check stubs, so forth, precisely what was done?

A. No, I cannot.

[117] Q. In some cases at least you would have to [go] back to the voucher from * * * whoever is responsible for expenditures * * * and say "what did you do here," have to deal with them directly?

A. Certainly, right.

* * * *

Q. Now, take a look at Defendant [UTP] Exhibit 67, the MEA Budgetary Expenditures, '76 to '77. * * * that chart doesn't help us in determining what was actually done with, say, UNISERV funds or in the Field Operations segment of the pie there or in the area Governance; there is no information as to activities in that chart, is there?

A. It doesn't reflect activities.

Q. It wasn't intended to?

A. It wasn't intended to.

Q. And that information on activities can't be drawn out of that chart?

A. No.

Q. And it's also correct to say, is it not, sir, that that Chart 67 certainly provides no information as to the total amount of political expenditures by MEA, does it, in 76/77?

A. No, it doesn't show that, the total.⁴⁶⁹

If, by the admission under oath of MEA's own Business Manager, MEA's financial statements did not permit isolation and quantification of its activities in such typically political areas as partisan politics, lobbying, propaganda and agitation, political litigation, and political organizing; and if, to attempt to isolate and quantify these activities, one first would have to consult MEA's "paid vouchers, expense vouchers, detail documents" (none of which the UTP chose to introduce at trial), and even then would have to interview dozens of MEA's officials and staff-personnel to ascertain (if possible ⁴⁷⁰) what they actually did from day to day—how, [118] then, could this Court "find" that the predominant part of MEA's "political" activities "are closely and directly related to furtherance of [MEA's] collective bargaining activities"? ⁴⁷¹ Without knowing *what* MEA's "political" activities are, how can the Court say to what they may be "related", "closely and directly", tangentially and indirectly, or in any other way?

Obviously, the Court's purported finding rests on mere suspicion and speculation. Suspicion and conjecture, how-

⁴⁶⁹ T. at 5086-92, 5094-96.

⁴⁷⁰ See *post*, pp. 151-67.

⁴⁷¹ CFF at 12.

ever, are not evidence,⁴⁷³ and “cannot supply the place of proof”.⁴⁷³ They do not constitute “substantial evidence”,⁴⁷⁴ and cannot support findings of fact⁴⁷⁵—particularly in a case, such as this, where clear and convincing evidence is required.⁴⁷⁶ To be sure, from the testimony of Dunn, Brunell, and Durham concerning the UTP’s “many exhibits relating to budget allocations”, at least two interpretations of the organization’s program are possible: (i) that it is predominantly political, and “unrelated to collective bargaining”; or (ii) that it is [119] predominantly political, but “related to collective bargaining”.⁴⁷⁷ This equivocation, however, destroys the UTP’s case based on these “exhibits”: For “[s]o uncertain a chain of proof does not add up to the requisite ‘clear, unequivocal, and convincing’ evidence” needed here.⁴⁷⁸

Even more compelling, *actual* consideration of the testimony of MEA’s Business Manager, as opposed to the Court’s variety of “carefu[l] revie[w]”, exposes at least

⁴⁷³ *E.g.*, *Cupples Co. Manufacturers v. NLRB*, 106 F.2d 100, 104-05 (8th Cir. 1939); *Controller of California v. Lockwood*, 193 F.2d 169, 172 (9th Cir. 1951).

⁴⁷⁴ *Moore v. Chesapeake & O.R.R.*, 340 U.S. 573, 577-78 (1951).

⁴⁷⁵ *E.g.*, *Morrison-Knudsen Co. v. NLRB*, 276 F.2d 63, 72-73 (9th Cir. 1960); *Gatson v. Garnder*, 247 F. Supp. 441, 442 (D.S.C. 1964).

⁴⁷⁶ *E.g.*, *Solomon v. Northwestern State Bank*, 327 F.2d 720, 723 (8th Cir. 1964); *Arena Co. v. Minneapolis Gas Co.*, 234 F.2d 451, 459 (8th Cir. 1956).

⁴⁷⁷ *E.g.*, *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 300 (1888).

⁴⁷⁸ The second of these interpretations is theoretically possible, but foreclosed in practice here because of the parties’ stipulations. PRS Nos. 13-14, 30a, 49-50.

⁴⁷⁹ *Schneiderman v. United States*, 320 U.S. 118, 158-59 (1943).

one of the UTP's exhibits as fraudulent. This Court claims that "[e]xtensive evidence * * * established that at least 75% of MCCFA member dues are expended by or on direct behalf of MCCFA".⁴⁷⁹ Of course, even if true, this "fact" would be irrelevant. The UTP could be a political-action, or predominantly political organization even if it collected *no* dues-monies from members, or even if each level spent only the dues-monies it collected at that level. IMPACE and NEA-PAC, for example, collect *no dues-monies* from UTP members, only voluntary contributions. Yet, no one would deny that they, taken individually, are predominantly political in character. Its irrelevance aside, though, the "fact" the Court states is simply the product of the Court's blind acceptance of an "exhibit" *the UTP's attorneys concocted and MEA's Business Manager Brunell explicitly disavowed and discredited in sworn testimony.*

Actually, two UTP exhibits were involved, one a calculation (Exhibit No. 69) and the other a graphical summary of [120] that calculation (Chart No. 68), which purported to "allocate" the expenditure of MCCFA membership-dues among MCCFA, MEA, and NEA for the fiscal year 1976-1977. MEA's Business Manager Brunell, through whom the UTP attempted to introduce the exhibits, admitted that he had never performed such a calculation before, had never seen such a calculation made by NEA or any local-level affiliate of MEA, and had done nothing more in its preparation than ministerially checking the arithmetic as presented to him by the UTP's attorneys:

Q. * * * you didn't physically draw these charts?

A. I didn't physically draw them.

Q. You came back and looked at the figures that were used in the chart and you made the calculation?

A. Yes.

⁴⁷⁹ CFF at 6.

Q. How about this [UTP] Exhibit 69, the explanation of allocation, who originally drew this up?

. . . .

A. It was a joint venture between [the UTP's attorneys] and myself. We sat down together.

Q. Have you ever done a calculation of this kind before?

. . . .

A. I have never done it before.

. . . .

Q. Mr. Brunell, I direct your attention to this [UTP] Exhibit No. 69, it's true, is it not, that when you first saw this exhibit, in essence all the methodology had been worked out beforehand, [and] you were asked to verify that the methodology was a satisfactory one in some sense?

A. Yes.

[121] Q. And the figures * * * were given to you and you were asked to check whether those figures were correct and had been drawn from these various documents in a proper fashion?

A. Yes.

Q. And that's what you did, you took the * * * methodology given to you by [the UTP's attorneys] and said that's okay?

A. I went through the entire calculations and verbage to verify that they were actually correct.

Q. And in your experience as a budget manager * * * of MEA you have never made a calculation of this kind ever before, have you?

A. I have never made a similar calculation.

Q. Have you ever seen a local Association affiliated with MEA make a calculation of this kind?

A. No.

Q. Have you ever seen anyone connected with NEA make a calculation of this kind?

A. No.⁴⁸⁰

And MCCFA's President Durham, through whom the UTP attempted to introduce various of MCCFA's financial documents, also conceded that he had not participated in any way in preparing the purported "allocation".⁴⁸¹

Burnell then admitted that the "allocation", far from constituting what this Court calls "[e]xtensive evidence", had no sound basis in accounting, merely presented one of many possible distributions of MCCFA's expenditures, and in any event rested on factual assumptions concerning which Brunell himself had no personal knowledge:

[122] Q. * * * As I understand it, to come up with the figure in [UTP] Chart 68, you allocated to the MCCFA part of the graph the monies that go to pay for Chesebrough's expenses and salary, isn't that right?

A. Yes.

Q. Chesebrough is an MEA employee, isn't he?

A. Yes.

Q. Wouldn't it have been just as appropriate to have put Chesebrough's expenditures in the UNISERV funding category of MEA?

A. Except that Chesebrough is, as we view it, a department called MCCFA within the MEA budget.

Q. Well, it's an MEA expenditure.

⁴⁸⁰ T. at 5079, 5084-85.

⁴⁸¹ *Id.* at 5374-76.

A. It's an MEA expenditure.

Q. So we could draw another one of these charts with Chesebrough's expenditure put into the UNISERV block there of [the] MEA expenditure block, and we would be, really, on as sound an accounting basis as the one that you used for drawing [UTP] Chart No. 68 as it now appears. It wouldn't be an error to put Chesebrough in the UNISERV block of MEA, would it?

A. It wouldn't be totally an error, no.

Q. No. And similarly, with the money that comes from NEA that goes to finance Chesebrough, we could have taken * * * that \$9,000 and put it into the NEA block, and on an accounting basis that wouldn't have been totally incorrect, either.

* * * *

A. We could have.

Q. Now, sir, you are aware that the * * * MCCFA Board of Directors and Executive Committee spend at least some of their time dealing with Association matters that involve MEA and NEA, isn't that right?

A. I have never attended any of the [123] meetings, but I guess I would assume that would be the case.

Q. All right. So you have no independent direct knowledge of what * * * those two organization units do?

A. Which two?

Q. The Board of Directors and the Executive Committee of MCCFA.

A. Okay.

Q. I take it you would also assume that the President of MCCFA might spend some of his time dealing with matters related to MEA and NEA?

A. I would assume that to be the case.

Q. You don't know that for a fact?

A. I don't know that for a fact.

Q. But nevertheless, in making up this allocation of MCCFA members' dues, [UTP] Chart No. 68, you attributed all of the expenditures of the Board of the Directors and the Executive Committee and the President of MCCFA to the MCCFA block without any attempt to determine the extent to which those three units were involved with MEA or NEA, isn't that right?

A. That's right. And the intent is not to try to figure out the activities of any of the functions based on our accounting records.

Q. I've got a pretty good idea of what the intent is here, sir. Now, the same thing is true, is it not, with respect to Chesebrough, that is, you didn't go through and try to determine how much of Chesebrough's salary or that amount—what is it, 45,000-something—that comes from the MEA subsidy to Chesebrough, what percentages of that might be expended on activities by Chesebrough that were related to MEA or NEA program activities.

A. No.

Q. You just allocated that all to MCCFA?

A. That's correct.

[124] Q. Or should I say the calculations that you were given in [UTP] Exhibit 69 allocated all of that to MCCFA?

A. The calculation which I verified.

Q. And what you verified was the numbers, isn't that right?

A. I verified the numbers.

Q. You didn't come in and say, "Now, wait a minute. You've got Chesebrough 100 percent allocated to MCCFA." That wasn't your judgment * * * ?

A. I'm not sure there needed to be a judgment made on that.

Q. You didn't decide that. You didn't say, "That's the way this calculation should be done. That Chesebrough should be 100 percent allocated to MCCFA."

A. I think that's the way our accounting system suggests that it be done.

Q. That's the way [UTP Exhibit No.] 69 gave it to you.

A. Based on the other Exhibits.

Q. Well, you said you've never done a calculation such as is shown in [UTP Exhibit No.] 69 before. Isn't this a separate, completely new calculation?

A. That's correct, yes.

Q. Now, you also talked about some legal fees that MEA paid for MCCFA. That was an MEA expense on behalf of MCCFA, wasn't it?

A. Yes.

Q. And as a matter of accounting, it wouldn't be wrong to allocate that to the MEA expenditures slice of the pie, would it?

A. It wouldn't be wrong to allow it to remain as an MEA expense.⁴³²

[125] Plaintiffs' counsel, then, was merely stating facts when he objected to MCCFA's purported "allocation" as lacking in foundation, based on hearsay, and "obviously

⁴³² *Id.* at 5907-5101.

fabricated for the purpose of this case and this case alone".⁴⁸³ What shatters one's faith in the high ideals of the judicial system is this Court's apparent willingness, in the teeth of irrefutable evidence from the UTP's own witness that the "allocation" was the half-baked concoction of the UTP's attorneys, not only to credit that "allocation" at all, but explicitly to praise it as "[e]xtensive evidence", and (by implication) to "find" it clear and convincing proof. "The parties to a lawsuit, *if they are honest*, do not manufacture * * * evidence".⁴⁸⁴ Neither should the Court accept such manufactured evidence—except as an admission by conduct of the *non-existence* of the UTP's case.

b. The United Teaching Profession's own witness conceded that its "rebate procedure" was inadmissible, and defective in numerous particulars.

Recognizing that the various financial documents of NEA, MEA, and MCCFA were incompetent to segregate and quantify its political activities, the UTP also attempted to offer in evidence NEA's so-called "political-activity rebate procedure", the sole calculation by any level of the organization of its yearly political expenditures.⁴⁸⁵ And, apparently, this Court has credited the results of that procedure by "finding" that [126] "[t]here was no evidence introduced showing that NEA expended more than the rebateable amounts on political activity unrelated to collective bargaining matters".⁴⁸⁶

However, the Court's "finding" is a pastiche of errors. For example, the Court's use of the standard "political

⁴⁸³ *Id.* at 5077, 5079-81.

⁴⁸⁴ *London Guarantee & Accident Co. v. Woelfle*, 83 F.2d 325, 332 (8th Cir. 1956) (emphasis supplied).

⁴⁸⁵ PFF Nos. 154-55.

⁴⁸⁶ CFF at 11.

activity unrelated to collective bargaining *matters*" is invalid. In the context of this case, the correct standard is "political activity not an integral part of the process of 'meet[ing] and negotiat[ing]' in the community colleges"⁴⁸⁷—and, as the UTP has stipulated that NEA participates *not at all* in "meet[ing] and negotiat[ing]" in the colleges,⁴⁸⁸ necessarily *all* of its "political" and any other kind of activity is "unrelated to collective bargaining" under *Abood*. And again, the Court's statement that there was "no evidence" challenging the "rebate" calculation, besides overlooking the testimony of Plaintiffs' expert-witness in political science⁴⁸⁹ and the massive catalogue of UTP admissions of substantial and essential political involvement,⁴⁹⁰ neglects such mundane matters as how Plaintiffs' content-analyses of the minutes of NEA's governing-bodies and of its newspaper showed an amount of political activity much greater than the UTP calculated according to the "rebate" procedure.⁴⁹¹

Most importantly, though, the Court's "finding" wrongly implies that Plaintiffs had a burden to disprove "[t]he [127] rebatable amounts, as determined by NEA",⁴⁹² rather than the UTP having the burden to prove those amounts in the first instance with clear and convincing evidence. Or, even worse in light of the record, the Court's "finding" implies that the UTP produced evidence satisfying that rigorous standard. Nothing could be further from the truth—as *every witness who testified on the subject agreed*.

⁴⁸⁷ See *ante*, pp. 58-63.

⁴⁸⁸ PRS No. 49.

⁴⁸⁹ PFF Nos. 103-20, 134-40.

⁴⁹⁰ *Id.* Nos. 58-97, 121-40.

⁴⁹¹ *Id.* No. 157 (vi) (a, c).

⁴⁹² CFF at 11.

Plaintiffs' expert-witness in accounting, the only such expert who testified,⁴⁹³ condemned the "rebate" procedure as "unreliable", because "[t]he methodology that was used . . . doesn't satisfy the requirements of generally accepted principles of cost analysis".⁴⁹⁴ Without contradiction or even challenge, he catalogued numerous serious deficiencies in the procedure,⁴⁹⁵ and concluded that, as a matter of accountancy, the "rebate" did not constitute a good-faith effort to quantify NEA's "political" expenditures.⁴⁹⁶ How, in the face of this dispositive testimony, the Court can credit the "rebate" calculation at all, let alone impliedly adopt it, passes understanding. One need not be a legal scholar to realize that a procedure that purports to *quantify* an organization's "political" expenditures, yet "doesn't satisfy the requirements of generally accepted principles of cost analysis",⁴⁹⁷ [128] ignores the organization's own financial-accounting system,⁴⁹⁸ lacks internal controls,⁴⁹⁹ has a deficient data-base,⁵⁰⁰ evidences no managerial supervision,⁵⁰¹ and exhibits no tests of compliance with its own criteria for estimating "political" costs,⁵⁰² does

⁴⁹³ The witness through whom the UTP attempted to introduce the "rebate" calculation, NEA's Deputy Executive Director Dunn, was a certified public accountant. But the UTP did not attempt to qualify him as such. PFF at 65 n.244.

⁴⁹⁴ *Id.* No. 158.

⁴⁹⁵ *Id.* No. 159.

⁴⁹⁶ *Id.* No. 160.

⁴⁹⁷ *Id.* No. 158.

⁴⁹⁸ *Id.* No. 159(i).

⁴⁹⁹ *Id.* No. 159(ii).

⁵⁰⁰ *Id.* No. 159(iii).

⁵⁰¹ *Id.* No. 159(iv-v).

⁵⁰² *Id.* No. 159(vii).

not provide clear and convincing evidence of anything. Indeed, even the proverbial man in the street would conclude that a procedure so lacking in good faith as not even to approach generally accepted cost-accounting standards⁵⁰³ does not provide proof beyond a reasonable doubt—but is itself reason for doubt, if not for conclusive disbelief, of the UTP's whole case.

Moreover, the UTP's own witness, NEA's Deputy Executive Director Dunn, confirmed and amplified each criticism of Plaintiffs' expert-witness in accounting, and indicated in numerous other particulars why the "rebate" was both unreliable and inadmissible as against Plaintiffs (although it constituted an admission, as against NEA, of substantial involvement in political activism⁵⁰⁴). For example, Dunn admitted that he himself performed only a ministerial role in calculating the "rebate" amount, and that the individuals with personal knowledge concerning the calculation either did not appear as witnesses at trial or did not choose to testify concerning the [129] "rebate".⁵⁰⁵ Dunn also admitted that even a certified public accountant could not verify the results of the "rebate" in so far as its definition of "political" activity was concerned.⁵⁰⁶ And he conceded that, even to check the arithmetical computation alone, an accountant would need access to underlying UTP documents on which those performing the "rebate"-analysis relied—documents which the UTP had refused to produce during discovery and did not disgorge at trial,⁵⁰⁷ and which Dunn admitted he had never personally reviewed.⁵⁰⁸

⁵⁰³ *Id.* No. 160.

⁵⁰⁴ *Id.* No. 156.

⁵⁰⁵ *Id.* No. 157(iv). *See id.* No. 157(i-iii).

⁵⁰⁶ *Id.* No. 157(v).

⁵⁰⁷ *Id.* No. 157(v) & n.285.

⁵⁰⁸ *Id.* No. 157(v) & n.286.

In addition, Dunn admitted that the “rebate”—rather than attempting to determine the actual extent of UTP “political” activities in those areas—merely assigned arbitrary percentages to UniServ, NEA governance, and NEA administration, without performing detailed surveys or content-analyses.⁵⁰⁹ Needless to emphasize, these percentages were grossly understated, in comparison to what the UTP’s own extensive qualitative and quantitative survey of UniServ showed concerning that sub-unit’s involvement in politics,⁵¹⁰ and to Plaintiffs’ content-analyses of the minutes of NEA’s governing-bodies.⁵¹¹ Furthermore, with regard to UniServ, the arbitrarily assigned percentage conflicted with stipulations that, on the basis of [130] its accounting-system and -records, NEA cannot determine the total monetary amounts, or percentage of their budgets, that UniServ units spend on political activism.⁵¹²

In short, the UTP’s “rebate” procedure was inadmissible as against Plaintiffs because: (i) the witness who testified concerning it had no personal knowledge of the calculation;⁵¹³ and (ii) the “rebate” calculation itself was a summary, which the UTP attempted to introduce without making available to Plaintiffs all the underlying documents used in arriving at the “rebateable” amount.⁵¹⁴ And, in any event, the UTP’s own witness catalogued example after example of the “rebate”- calculation’s unreliability. Thus, as with the UTP’s other “[e]xtensive evidence” (to quote the Court’s misnomer), the “rebate procedure” amounted to

⁵⁰⁹ *Id.* No. 157(vi)(a).

⁵¹⁰ *See ante*, note 315.

⁵¹¹ *See* PFF No. 138 & nn.237-38, and compare with *id.* at 79 n.287.

⁵¹² PRS Nos. 69-78.

⁵¹³ Federal Rule of Evidence 602. *See* PFF at 77-78 & n.282.

⁵¹⁴ Federal Rule of Evidence 1006. *See* PFF at 78 n.285. On the extent of the underlying documents, *see id.* at 104 n.367.

no evidence in support of the UTP's case—certainly not substantial evidence, a preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. Indeed, if it had any value as evidence, it was to admit NEA's substantial involvement in political activism,⁵¹⁵ and to justify adverse inferences against the UTP for its failure to call and interrogate witnesses with personal knowledge of the procedure.⁵¹⁶

In effect, this Court has ruled that the UTP can satisfy the clear-and-convincing-evidence standard by concocting a [131] "rebate procedure" according to its own arbitrary and erroneous definition of "political" activity,⁵¹⁷ by offering as a witness on that procedure an individual who played no substantive role in and had no personal knowledge of its development or implementation,⁵¹⁸ by refusing to call or interrogate as witnesses the persons who were actively involved in calculating the "rebate",⁵¹⁹ by withholding from Plaintiffs during discovery and at trial the documents on which those persons supposedly based their computations,⁵²⁰

⁵¹⁵ PFF No. 156; *id.* at 77-78 n.282.

⁵¹⁶ *Id.* No. 157(i-iv). *See also* School Comm. v. Greenfield Educ. Ass'n, 109 L.R.R.M. 2420, 2424-27 (Mass. 1982) (NEA "rebate" procedure held constitutionally inadequate on its face, "cumbersome to the extreme", and "designed to discourage all but the most zealous employee").

⁵¹⁷ *Id.* No. 157(iii).

⁵¹⁸ *Id.* No. 157(i-ii, iv). This fact alone renders Dunn's testimony inadmissible as against Plaintiffs. *See, e.g.,* Burton v. Driggs, 87 U.S. (20 Wall.) 125, 135-36 (1873); Beck v. United States, 33 F.2d 107, 113 (8th Cir. 1929); Nager Electric Co. v. United States, 442 F.2d 936, 950 (Ct. Cl. 1971); Butler Timber Co. v. United States, 91 F.2d 884, 888-89 (6th Cir. 1937); Briggs Mfg. Co. v. United States, 30 F.2d 962, 967 (D. Conn. 1929).

⁵¹⁹ PFF No. 157(i, iv).

⁵²⁰ *Id.* No. 157(v).

and by adopting arbitrary results that contradicted its own records, stipulations of the parties, and Plaintiffs' unchallenged content-analyses.⁵²¹ If the Court is correct that such "evidence" as this is "clear and convincing", and qualifies as proof *beyond a reasonable doubt*, then Dickens' celebrated indictment of the judicial system is a complimentary understatement.

2. *Rather than constituting clear and convincing evidence of the United Teaching Profession's contentions, the testimony of the witnesses who purported to describe its general program was inadmissible.*

In conclusory fashion, the Court's findings recite how, supposedly, "[t]he testimony * * * relating to MEA activities [132] clearly establish[es] that all but an insignificant portion of such activities relate directly to collective bargaining issues", and "[t]he overwhelming majority of NEA's budget expenditures relate to [collective bargaining]", too.⁵²² Obviously, as the preceding section explains, the Court cannot legally or rationally derive this purported "knowledge" from the UTP's "many exhibits relating to budget allocations" or the testimony concerning them.⁵²³ Whence came this remarkable insight, then? If from anywhere in the record, it must have emanated from the testimony: (i) of NEA's Goal Director Watts, who purported to describe the general program of the UTP's national level; and (ii) of MEA's Assistant Executive Director for Negotiations Lentz, who purported to describe the general program of the UTP's state-level sub-unit in Minnesota. *Essentially all of this testimony, however, was inadmissible because of the witnesses' lack of personal knowledge of the subject-matter.*

⁵²¹ *Id.* No. 157(vi).

⁵²² CFF at 10.

⁵²³ Contrast *id.* at 12 with pp. 111-31, *ante*.

For example, Watts claimed to oversee only two of NEA's six so-called "goal areas", and only one of its three so-called "support services".⁵²⁴ Even if he had had comprehensive personal knowledge of all the activities in these three departments, then, he still would have lacked such knowledge concerning the remaining two-thirds of NEA's general program-structure, not [133] to mention its administrative services and governance.⁵²⁵

But Watts admitted to no such comprehensive personal knowledge even of the departments over which he exercised titular supervision. Rather, he twice conceded that he derived most of his "personal" information from second-hand accounts that percolated up to him from a huge staff spread throughout the United States. First:

Q. * * * approximately how many subordinates do you have working for you in the two goal areas that you supervise?

A. Oh, 130.

Q. Would it be true to say that large numbers of these people work in the field as opposed to in the Washington[, D.C.,] office of NEA?

A. Yes, most of them work in the field.

* * * *

A. Oh, around [100].

⁵²⁴ Compare T. at 4714-15 with 1977-78 NEA Handbook (UTP Exhibit No. 7), at 39-50.

⁵²⁵ See, e.g., 1977-78 NEA Handbook (UTP Exhibit No. 7) at 11-29, 51-54. No other Goal Director or head of a "support service" testified on behalf of the UTP at trial. In other words, *the UTP failed even to attempt to prove the content of no less than two-thirds of NEA's program-structure. See T. at 4758-59.*

Q. * * * you don't personally observe the activities of
* * * those 100 people that are working outside of the
Washington, D.C. office?

A. That's correct.

* * * *

A. As a proper administrator I have an extensive knowledge of what they are doing.

Q. Well, is it from reports that they make to you? Or, do they make verbal communications if they are in your immediate office? Or, do they send you memoranda or written communications of one kind or another?

[134] A. Yes, all of those.

Q. And you maintain fairly extensive files of those communications, do you not?

* * * *

A. * * * there were 100 file drawers [of documents] or something in that neighborhood.⁵²⁶

And again:

Q. * * * the testimony you've given * * * is based upon reports that you've received from your subordinates, discussions you've had with your subordinates at various times, some personal interactions with your subordinates, some observations of their activities and these summary documents * * *, Defendant NEA Exhibit 26, * * * 27 and the NEA Handbook for '79 which is Plaintiffs' Trial Exhibit No. 31?

A. Yes. And my personal knowledge.

Q. What in the testimony you just gave was based on your personal knowledge specifically?

⁵²⁶ T. at 4717-18 (voir dire examination).

- A. . . . everything I just gave was based upon my personal knowledge.
- Q. Well, you just said that some of it was gained from reports you received from your subordinates.
- A. That now becomes my personal knowledge.
- Q. I see. You are defining your personal knowledge as all the information that you've retained in your mind wherever you received it from?
- A. Yes.⁵²⁷

The Federal Rules of Evidence, however, do not define "personal knowledge" as loosely as did Watts and the UTP. Under those Rules, more than the regurgitation of hearsay is necessary to [135] qualify as *admissible* evidence, let alone as clear and convincing evidence.⁵²⁸

Plaintiffs seasonably objected to Watts' testimony at numerous points in the proceedings,⁵²⁹ and moved to strike it in its entirety after cross-examination once more revealed its almost total lack of foundation in the witness' own knowledge.⁵³⁰ Yet now, apparently, this Court relies upon that testimony for the sweeping conclusion that the "overwhelming majority of NEA's budget expenditures relate to [collective bargaining]".⁵³¹ How, even if admissible and credible in whole, Watts' testimony could support any statement regarding the "*overwhelming majority* of NEA's budget expenditures", when Watts himself supervised *no more than one-third* of NEA'S program-structure, defies

⁵²⁷ *Id.* at 4757 (cross-examination).

⁵²⁸ *See, e.g., 3 Weinstein's Evidence* (1981), ¶ 602[01].

⁵²⁹ *E.g., T.* at 4720, 4724-25.

⁵³⁰ *Id.* at 4759-61.

⁵³¹ CFF at 10.

logical explanation. And how, when almost entirely inadmissible, Watts' testimony constituted clear and convincing evidence of anything, equally defies legal explanation.⁵³² After all, Watts was not the chief executive officer or administrator of NEA, with responsibility for overseeing its entire program.⁵³³ Rather, he was the titular head of only two "goal areas" and one "support service" out of six such "areas" and three such "services".⁵³⁴ And he was not even the [136] head of the units most obviously concerned with political activism: NEA Government Relations⁵³⁵ and NEA Communications.⁵³⁶ (Revealingly, the UTP refused to call as a witness NEA's Executive Director, or anyone from Government Relations or Communications.⁵³⁷) More-

⁵³² Hearsay testimony, of course, is not even "substantial evidence". *E.g.*, *Hill v. Fleming*, 169 F. Supp. 240, 245 (W.D. Pa. 1958).

⁵³³ See 1977-78 *NEA Handbook* (UTP Exhibit No. 7) at 11 (NEA's "president is the chief executive and policy officer and official spokesperson"), 37 (NEA's "executive director is the chief administrator").

⁵³⁴ *Id.* at 39-50.

⁵³⁵ *Id.* at 46-47.

⁵³⁶ *Id.* at 48-49.

⁵³⁷ This failure to adduce testimony from those individuals arguably qualified to present it amounts to "strong confirmation" of Plaintiffs' charge that the UTP is a predominantly political organization. See *Local 167, Teamsters v. United States*, 291 U.S. 293, 298 (1934). *Accord*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-26 (1939); *Mammoth Oil Co. v. United States*, 275 U.S. 13, 51-53 (1927); *The New York*, 175 U.S. 187, 204-05 (1899); *Wetmore v. Rymer*, 169 U.S. 115, 127 (1898); *Kirby v. Tallmadge*, 160 U.S. 379, 382-83 (1896); *Runkle v. Burnham*, 153 U.S. 216, 225-26 (1894); *Bowden v. Johnson*, 107 U.S. 251, 262-63 (1882); *Culbertson v. The Steamer Southern Belle*, 59 U.S. (18 How.) 584, 588 (1855); *Clifton v. United States*, 45 U.S. (4 How.) 242, 246-48 (1846).

over, Watts purported to describe the activities of more than one hundred individuals, scattered throughout the United States, from "knowledge" based upon conversations with unidentified persons and written reports and memoranda *none of which the UTP bothered to introduce as evidence at trial.*⁵³⁸ Such testimony does not amount to

⁵³⁸ Again, this failure to adduce the best evidence, in terms of witnesses and documents, is fatal to the UTP's case. In addition to the authorities cited *ante*, note 537, *see, e.g.*, *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 110-11 (1941); *Bilokumsky v. Tod*, 263 U.S. 149, 153-55 (1923); *Illinois C.R.R. v. Staples*, 272 F.2d 829, 833-34 (8th Cir. 1959); *Illinois Terminal Co. v. Friedman*, 210 F.2d 229, 231 (8th Cir. 1954); *Meier v. Commissioner*, 199 F.2d 392, 396 (8th Cir. 1952); *Mid-Continent Petroleum Co. v. Keen*, 157 F.2d 310, 318 (8th Cir. 1946); *Hossack v. Metzger*, 156 F.2d 501, 506 (8th Cir. 1946); *Gross v. Williams*, 149 F.2d 84, 86 (8th Cir. 1945); *Raiche v. Standard Oil Co.*, 137 F.2d 446, 449 (8th Cir. 1943); *Goldie v. Cox*, 130 F.2d 695, 719-20 (8th Cir. 1942); *Futrell v. Arkansas-Missouri Power Corp.*, 104 F.2d 752, 757 (8th Cir. 1939); *United Broadcasting Co. v. Armes*, 506 F.2d 766, 770 (5th Cir. 1975); *Tupman Thurlow Co., Inc. v. S.S. Cap Castillo*, 490 F.2d 302, 308 (2d Cir. 1974); *UAW v. NLRB*, 459 F.2d 1329, 1335-36, 1338, 1342, 1345 (D.C. Cir. 1972); *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580, 593 (2d Cir. 1971); *P.R. Mallory & Co. v. NLRB*, 400 F.2d 956, 959 (7th Cir. 1968); *Paceon, Inc. v. United States*, 399 F.2d 162, 172 (Ct. Cl. 1968); *Cromling v. Pittsburgh & L.E.R.R.*, 32 F.2d 142, 148-49 (3d Cir. 1964); *Georgia S. & F. Ry. v. Perry*, 326 F.2d 921, 924-25 (5th Cir. 1964); *N. Sims Organ & Co. v. SEC*, 293 F.2d 78, 79-81 (2d Cir. 1961); *Stoumen v. Commissioner*, 208 F.2d 903, 907 (3d Cir. 1953); *Neidhoefer v. Automobile Ins. Co.*, 182 F.2d 269, 270-71 (7th Cir. 1959); *Mayson Mfg. Co. v. Commissioner*, 178 F.2d 115, 121-22 (6th Cir. 1949); *Austerbery v. United States*, 169 F.2d 583, 593 (6th Cir. 1948); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 739, 743 (3d Cir. 1945); *Bowles v. Lentin*, 151 F.2d 615, 619 (7th Cir. 1945); *NLRB v. Ohio Calcium Co.*, 133 F.2d 721, 727 (6th Cir. 1943); *W.H. Miner, Inc. v. Peerless Equipment Co.*, 115 F.2d 650, 655 (7th Cir. 1940).

[137] "proof [that is] clear, satisfactory and beyond a reasonable doubt".⁵³⁹ And in so far as Watts' testimony purported to reflect or comment on information contained in NEA's financial documents, it was valueless; for the UTP's own witnesses, together with Plaintiffs' expert-witness in accounting, testified that these documents did not and could not identify or segregate NEA's activities into the categories "politics" and "collective bargaining".⁵⁴⁰ Finally, at best Watts' testimony amounted only to vague, *qualitative* generalities, not the *quantitative* analysis that the UTP had to provide to prove its case.⁵⁴¹

Perhaps even more inexplicable on logical and legal grounds than the adoption of Watts' rambling monologue⁵⁴² is [138] this Court's apparent reliance on the testimony of MEA's Assistant Executive Director for Negotiations Lentz. As with Watts, the UTP attempted to (mis)represent Lentz as an individual with catholic knowledge of MEA,⁵⁴³ even though Lentz himself admitted under oath that MEA's Executive Director Gallop, whom the UTP did

⁵³⁹ The Barbed Wire Patent, 143 U.S. 275, 284 (1892): "Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information."

⁵⁴⁰ PFF Nos. 151-53. Again, revealingly, Watts said nothing whatsoever about NEA's fraudulent "rebate procedure"—although he (among other Goal Directors), supposedly performed the "rebate" calculation. *Id.* No. 157(iv) & n.280.

⁵⁴¹ *Ante*, note 356. Such vague testimony, of course, is not "substantial evidence". *E.g.*, Commercial Casualty Ins. Co. v. Stinson, 111 F.2d 63, 64 (6th Cir. 1940).

⁵⁴² *See* T. at 4744-45.

⁵⁴³ *Id.* at 5034: "if any person is qualified to talk about what the MEA does, Mr. Lentz is that person" (remarks of the UTP's counsel).

not call as a witness,⁵⁴⁴ is "the boss. He's the chief staff officer. He has full responsibility for the direction and assignment of all staff as well as the hiring, promotion or termination of staff", has "responsibilities for the development of the [MEA's] budget", and is "responsible for the day-to-day operations [of MEA]".⁵⁴⁵

Lentz, of course, was but one of many staff-personnel for MEA.⁵⁴⁶ And all of his working-experiences, except for two years as a UniServ Director, had been in the single area of negotiations,⁵⁴⁷ one of *seven* different departments in MEA.⁵⁴⁸ Yet Lentz purported to give testimony describing almost all of MEA's extensive operations, including its Departments and Councils for Negotiations,⁵⁴⁹ with which he had various responsibilities at the time of his testimony; and Teachers Rights,⁵⁵⁰ Field Services,⁵⁵¹ Instruction and [139] Professional Development,⁵⁵² Communications,⁵⁵³ Economic Services,⁵⁵⁴ and Higher Education,⁵⁵⁵ with which he had no staff-responsibilities at that time. He also pur-

⁵⁴⁴ See *ante*, notes 537-38.

⁵⁴⁵ T. at 4925-26.

⁵⁴⁶ See PTE No. 101, diagramming MEA's professional staff.

⁵⁴⁷ T. at 4838-40.

⁵⁴⁸ *Id.* at 4844-45. See PTE No. 102.

⁵⁴⁹ T. at 4850-70.

⁵⁵⁰ *Id.* at 4870-84.

⁵⁵¹ *Id.* at 4884-91.

⁵⁵² *Id.* at 4891-907.

⁵⁵³ *Id.* at 4907-15.

⁵⁵⁴ *Id.* at 4915-17.

⁵⁵⁵ *Id.* at 4917-18.

ported to describe MEA's administration⁵⁵⁶ and governance-structure.⁵⁵⁷ *Conspicuous by its absence, though, was any testimony concerning MEA's Governmental Relations Department and Council*, the organizational unit most obviously involved in politics. So, in short, the UTP claimed that one individual, who had had direct, personal experience with only *one-seventh* of MEA's program was qualified to provide clear and convincing evidence of *sixth-sevenths* of that program. And although the UTP had the burden of proving the extent of MEA's political involvement, neither Lentz nor anyone else the UTP called as a witness bothered to describe what the Governmental Relations Department and Council have done over the years.

Characteristic of the lack of foundation in Lentz's testimony as a whole was his admission, concerning the public-relations activities of MEA's Communications Department, that "I cannot say with any certainty what the mix of all that might be".⁵⁵⁸ Similarly revealing was the manner in which the UTP purported to introduce documents into evidence through Lentz. For example, UTP Exhibit No. 56 (containing resource-materials for bargaining) had been prepared by someone other [140] than Lentz when he was not even involved with the activities described therein, and was three years out of date at the time of trial.⁵⁵⁹ Lentz conceded that he had more recent versions of the documents "at my office",⁵⁶⁰ but produced none at the hearings. UTP Exhibit No. 66 was also prepared before Lentz as-

⁵⁵⁶ *Id.* at 4922-27.

⁵⁵⁷ *Id.* at 4927-29.

⁵⁵⁸ *Id.* at 4911.

⁵⁵⁹ *Id.* at 4934-35.

⁵⁶⁰ *Id.* at 4935.

sumed his position,⁵⁶¹ and without his participation.⁵⁶² And Lentz conceded that he had no present knowledge of the subject-matter in the exhibit,⁵⁶³ and that his testimony concerning it rested merely on a guess, not something he “kn[e]w for a fact”.⁵⁶⁴ Lentz admitted as well that he didn’t know if UTP Exhibit No. 63 was outdated, and that to find out he would have to consult another MEA staffman (who, of course, did not testify).⁵⁶⁵ UTP Exhibit No. 50 (contracts between IMPACE and MEA for personal services), too, was prepared before Lentz assumed his position.⁵⁶⁶ He admitted having no authority to enter into such contracts between IMPACE and MEA,⁵⁶⁷ conceded he was not a signatory to any document in the exhibit,⁵⁶⁸ claimed no recall of specifics concerning the subject-matter,⁵⁶⁹ and testified to essentially [141] no knowledge of the issue⁵⁷⁰ other than hearsay.⁵⁷¹ UTP Exhibits 51, 64, and 66 were also outdated, according to Lentz.⁵⁷²

⁵⁶¹ *Id.* at 4937, 4938.

⁵⁶² *Id.* at 4940.

⁵⁶³ *Id.* at 4942.

⁵⁶⁴ *Id.* at 4937-38.

⁵⁶⁵ *Id.* at 4942-45.

⁵⁶⁶ *Id.* at 4951, 4952, 4955.

⁵⁶⁷ *Id.* at 4950-51.

⁵⁶⁸ *Id.* at 4952.

⁵⁶⁹ *Id.* at 4954-55.

⁵⁷⁰ *Id.* at 4953-54, 4957.

⁵⁷¹ *Id.* at 4952.

⁵⁷² *Id.* at 4960, 4963.

Apparently, the UTP's trial-tactic—in keeping with its overall litigation-strategy of “cover-up”⁵⁷³—was “to introduce only those documents produced during discovery within the discovery deadline which would fall under December 31, 1978”.⁵⁷⁴ How these documents would prove the extent of MEA's political involvement at the time of trial, 1980, the UTP did not say. Even less explicable is its notion that outdated records could provide clear and convincing proof of anything as the subjects of testimony by a witness who admitted his lack of connexion with, and knowledge of, the documents. As a matter of law, the documents and Lentz's testimony concerning them were inadmissible because of his lack of personal knowledge, and should have been stricken from the record pursuant to Plaintiffs' motions,⁵⁷⁵ rather than adopted as “fact”, as the Court seems to have adopted them.

Also illuminating in light of this Court's statement that “[t]he testimony . . . clearly establish[es] that all but an insignificant portion of [MEA's] activities relate directly [142] to collective bargaining issues”⁵⁷⁶ are Lentz's admissions of political activities of various departments of MEA. For example, he referred to MEA lobbying of the Minnesota Board of Teaching in the area of vocational licensing, contrasting this lobbying with activities on the same subject in negotiations.⁵⁷⁷ (Even so, he conceded that he was “not learned in the maneuverings [of the Board of Teaching]”.⁵⁷⁸) Lentz also described MEA's advocacy on

⁵⁷³ See *ante*, pp. 24-27.

⁵⁷⁴ T. at 4965-66 (remarks of the UTP's counsel).

⁵⁷⁵ *Id.* at 4936 (UTP Exhibit No. 56), 4945 (UTP Exhibit No. 63), 4957-58 (UTP Exhibit No. 50), 5033-34 (Lentz's testimony in its entirety).

⁵⁷⁶ CFF at 10.

⁵⁷⁷ T. at 4898-99.

⁵⁷⁸ *Id.* at 4990 (cross-examination).

behalf of its members before the State Department of Education in licensure-matters ⁵⁷⁹—a form of political litigation obviously *not* “an integral part of the bargaining process” in the community colleges, or anywhere else. And he referred to MEA’s lobbying efforts in 1980 on behalf of amendments to PELRA, ⁵⁸⁰ including a massive campaign in which he and other MEA staff-personnel attempted to influence both the Legislature and the Governor of Minnesota ⁵⁸¹—again, obviously, not an “integral part of the bargaining process” in terms of either of “meet[ing] and negotiat[ing]” itself, or even of seeking implementation of a negotiated agreement.

In short, similarly to that of Watts, Lentz’s testimony amounted only to vague generalizations, resting primarily on second- or third-hand “information” and out-of-date documents, none of which provided even “substantial” (let alone clear and [143] convincing) evidence of *what* MEA’s staff-personnel actually have done in “politics” and “collective bargaining”, and *no evidence whatsoever* of *how much* they have done in either of those areas.

This Court also purports to find that “[t]he testimony and exhibits relating to MCCFA activities clearly establish that nearly all such activities relate directly to collective bargaining”. ⁵⁸² Again, consideration of what “[t]he testimony and exhibits relating to MCCFA” actually showed explodes the Court’s conclusion. The sole witness the UTP presented on behalf of MCCFA was MCCFA’s President Durham. Through him, the UTP attempted to introduce various of MCCFA’s financial documents. As with Watts

⁵⁷⁹ *Id.* at 4874.

⁵⁸⁰ *Id.* at 4855.

⁵⁸¹ *Id.* at 4974-73 (cross-examination).

⁵⁸² CFF at 9.

and Lentz, though, the majority of Durham's testimony lacked any reasonable foundation in personal knowledge.

Plaintiffs, of course, do not contend that MCCFA, or Durham himself, expended no time or money on "meet[ing] and negotiat[ing]" in the community colleges. For Durham testified from personal knowledge that he engaged in negotiations on several different occasions.⁵⁸³ But he also testified that neither he nor MCCFA maintained any records of the amount of time spent in that activity,⁵⁸⁴ thus making quantification of MCCFA's involvement in "meet[ing] and negotiat[ing]" impossible.

Similarly, Durham conceded that he knew of no content-analysis of the minutes of MCCFA's Board of Directors that could establish the proportion of that body's time it devoted to "politics", to "collective bargaining", or to anything [144] else.⁵⁸⁵ Yet Plaintiffs had prepared and introduced into evidence just such an analysis.⁵⁸⁶ How Durham's vague testimony concerning the activities of MCCFA's Board of Directors⁵⁸⁷—which lacked even qualitative definition, let alone quantitative precision—could constitute what the Court calls "clea[r]" evidence when contrasted with Plaintiffs' content-analysis passes understanding:

Q. * * * you said that the board of directors of MCCFA is responsible for the general work of the Association on a day to day basis. * * *

A. That's correct.

⁵⁸³ T. at 5329-30.

⁵⁸⁴ *Id.* at 5384-85.

⁵⁸⁵ *Id.* at 5377-79.

⁵⁸⁶ PFF No. 138; PTE Nos. 128, 129.

⁵⁸⁷ T. at 5324-25, 5350, 5352-53.

Q. Have you ever done or requested that there be done on the minutes of the Board of Directors a content analysis to attempt to determine the extent to which the Board of Directors concerns itself with various activities such as negotiations, public relations activities, whatever criteria might have been used.

A. No.

Q. Are you aware of any such analysis ever having been prepared.

A. No.

Q. You haven't been told that there was an analysis in this case?

A. Not of our Board of Directors, no.

Q. Would it surprise you to learn * * * that the content analysis was performed on the MCCFA board minutes over a number of years and showed that the MCCFA Board * * * spent between 16 and 20 percent of its working activity on collective bargaining related matters?

A. * * * Yes, I would, and I don't believe that to be true.

[145] Q. On the basis of [n]ever having done or seen a content analysis of your own, that's the basis?

A. Yes.⁵⁸⁵

How can this Court "find" that "nearly all [of MCCFA's] activities relate directly to collective bargaining", when the only quantitative content-analysis of the minutes of MCCFA's chief governing-body showed that, over the years, that body has concerned itself with "bargaining" only 16-20% of the time?! By what arithmetical rule does 16-20% constitute "nearly all" of anything; or by what

⁵⁸⁵ *Id.* at 5377-79 (cross-examination).

legal rule does evidence demonstrating that 16-20% of MCCFA's activities relate to "collective bargaining" provide clear and convincing proof that "nearly all" of its activities so relate!!

Durham's testimony concerning MCCFA's financial documents was even less satisfactory than his vague comments on the activities of its Board of Directors. For Durham had attended some meetings of MCCFA's Board, from time to time, at least. Conversely, he admitted that, although he had been MCCFA's Treasurer in 1972-1973, he had had nothing to do with the preparation of the budget for 1976-1977 that the UTP purported to introduce into evidence through him.⁵⁸⁹ Plaintiffs therefore properly objected to his testimony as lacking in personal knowledge.⁵⁹⁰

In any event, though, Durham also admitted that the financial exhibits could not identify, segregate, or quantify MCCFA's activities in "politics":

[146] Q. Do you know if these financial documents * * * exemplified by [UTP] Exhibit 413 are designed to show in any way all of the political costs associated with the operation and activities of MCCFA?

A. I don't know what you mean by that.

Q. Well, is there any way you can take this document, 413, * * * schedule of operating expenditures and tell me the figure of all the political costs associated with the activities of the various individuals, committees, assemblies, boards, workshops, conventions, and so on, in which MCCFA personnel engaged during * * * '76-'77 fiscal year? Is the document designed to do that, to allow you to do that?

⁵⁸⁹ *Id.* at 5348-49, 5367 (cross-examination).

⁵⁹⁰ *Id.* at 5348, 5357-58, 5359.

A. I believe not but I'm not sure what you mean by political there.

. . . .

Q. * * * I'll give you a definition of political, first, that would include activities relating to election of candidates to public office, any way this particular document, '76-'77 schedule of operating expenses enables you to pull out a figure as to all the monies that may have been expended in '76-'77 in relation to candidates' campaigns?

A. Well, I don't believe there was any but no, it would not show that.

Q. Oh, I see. So, no one from MCCFA was on the MEA Governmental Relations Council, might have discussed on the Council during the 1976-'77 fiscal year activities in the 1976 elections? There was no such discussion in the MEA Governmental Relations Council in that year?

A. I don't know if there was or not.

Q. Of course you wouldn't know, you weren't on the Council, were you?

A. No.

Q. You certainly can't tell of your own personal knowledge that \$499.06 that's attributed to MEA Council activity might be properly allocatable to the activities on the MEA Governmental [147] Relations Council related to candidates' campaigns, can you?

A. Not in terms of discussion, no. I thought your question dealt with money that went into campaigns directly.

Q. No, no, not directly to campaigns but in the sense MCCFA officials or members, people that served in these areas, boards and so forth, had suggestions perhaps with respect to IMPACE, * * * that type of

thing. This document doesn't enable us to figure this out, isn't that true?

A. That's correct.

Q. It's not intended to either?

A. That's correct.

Q. Let's take party activities, precinct caucuses, State, District, National Conventions. * * * [T]he document * * * doesn't enable us to attribute money that may have been expended in 1976-'77 with relationship to activities of that kind, does it?

A. No. * * * [T]he document is a line item budget and it gives authority * * * to people to spend money to carry out their functions and the year-end statements show how that money was spent according to responsibility.

Q. But there is no way this document can be used to come up with a figure for activity with relationship to political parties?

A. No.

Q. I take it some of the experience in the Legislative Committee is directed to lobbying?

A. Not if you mean the Legislative Committee itself goes to the Legislature and lobbies, that's very rare.

Q. It does ultimately through perhaps someone else, lobbying, encouraging either membership or someone to contact Legislators, make contact. * * * [T]he Board of Directors, Executive Committee, President, Delegate Assembly, MCCFA Convention, some of the MEA Councils also from time to time during the [148] calendar year concern themselves with lobbying questions, legislative questions?

A. With legislative questions, yes.

Q. Well, legislative questions, by that I mean connected with the Legislature, what policies of MCCFA you want to try to get the Legislature to adopt * * * ?

A. In terms of first of all disseminating information and in some cases prompt action.

Q. And this document, [UTP Exhibit No.] 413 doesn't enable us to determine the total amount of monies expended in this fiscal year on legislative-related matters by all of these various boards, committees and individuals, does it?

A. No.

Q. It isn't intended to do that?

A. That's correct.

Q. And I take it the same would be true of public relations activities? You, for instance, said you were chief spokesman in MCCFA with respect to the public. Certainly this document doesn't enable us to determine the extent of your involvement in public relations on behalf of MCCFA, does it?

A. No, although it would pretty much indicate the limit in that, that is how much money was expended by the President.⁵⁹¹

Moreover, Durham conceded as well that the financial documents did not describe, let alone quantify, the extent to which MCCFA's members pursued voluntary "political" activities on its behalf:

Q. * * * you said with respect to the legislative committees [of MCCFA] that during the various years one of their activities was to encourage members of the organization to become involved in contacting legisla-

⁵⁹¹ *Id.* at 5368-72.

tors or otherwise trying to influence the passage of legislation. Is that correct?

[149] A. Yes.

Q. And that was one of the duties of the committee?

A. Right.

Q. And those members are not paid in any way by MCCFA for any activities in which they are involved directed toward influencing the Legislature?

A. No.

Q. So there is no way these financial statements can tell us the extent to which MCCFA's program is promoted by voluntary activities of its members?

.

A. The unpaid activities of the members are not reflected on this sheet (indicating).⁵⁹²

Yet, if the financial documents did not isolate and quantify either the amount of money MCCFA expended on "politics", or the amount of time its members voluntarily contributed to "political" activities, how could those documents "clearly establish that nearly all [of MCCFA's] activities relate directly to collective bargaining"? What Durham's testimony proved is that one cannot rationally conclude anything from MCCFA's financial documents concerning the extent of its, and its members', involvement in "politics" or "collective bargaining". Simply put, MCCFA's financial documents did not satisfy the heavy burden of proof this Court assigned to the UTP.

Finally, Durham (the *only* MCCFA official to testify on behalf of the UTP) exploded this Court's claim that "[e]xtensive evidence . . . established that at least 75% of MCCFA member dues are expended by or on behalf of

⁵⁹² *Id.* at 5376-77.

MCCFA",⁵⁹³ by [150] providing further evidence that the supposed "allocation", far from being a study carefully worked-out by MCCFA's officials, was merely a concoction of the UTP's attorneys:

Q. Do you see that chart over there, allocation of MCCFA members' dues, which has been labeled [UTP] Trial Exhibit 68?

A. I can see a chart there.

Q. Did you participate in any way in the preparation of that chart?

A. No, I did not.

Q. Did you participate in any way in the determination of the figures, allocation of expenditures and so forth that are purportedly represented on that chart?

A. No, I did not.

Q. Let me show you a thing called explanation of allocation of MCCFA members' dues, [UTP] Trial Exhibit No. 69. Have you ever seen that thing before?

A. I saw that just very briefly this morning.

Q. That was the first time you saw it?

A. Yes.

Q. Did you participate in any way in its preparation?

A. No, I did not.

Q. Were you involved in any conferences or discussions looking toward the [preparation] of this document in terms of discussing what the methodology or calculations should be?

A. No, I was not.

⁵⁹³ CFF at 6.

Q. The first time you saw it? The first time you knew that the thing existed was this morning?

A. That's correct.⁵⁹⁴

[151] Is it not more than passing strange that the witness the UTP presented as the *sole* expositor of MCCFA's program, and who purported to testify concerning its financial documents, had *nothing* whatsoever to do with preparation of the "allocation"—and that no other witness from MCCFA testified with respect to the "allocation", either?

In sum, in so far as the Court's "findings" concerning the involvement of the UTP in "collective bargaining" rest on the testimony of Watts, Lentz, and Durham, those "findings" are erroneous as a matter of law, because the testimony of these witnesses was inadmissible as against Plaintiffs under Federal Rule of Evidence 602 *inter alia*,⁵⁹⁵ and, where it was admissible, the testimony constituted admissions by the UTP that it did not and could not establish the extent of its involvement either in "politics" or in "collective bargaining" on the basis of the financial documents it attempted to introduce at trial.

3. Rather than constituting clear and convincing evidence of the United Teaching Profession's contentions, the testimony of its witnesses proved that it had no satisfactory means of establishing how much working-time UniServ Directors or other of its officials or staff-personnel expended either on "politics" or on "collective bargaining".

In purporting to find that NEA, MEA, and MCCFA engage in political activity predominantly "related to collective bargaining", this Court makes much of "the testimony of numerous officers and staff of MCCFA, MEA and NEA

⁵⁹⁴ T. at 5374-76. See *ante*, pp. 119-25.

⁵⁹⁵ See also PFF Nos. 168-72 (Federal Rule of Evidence 1006).

concerning the character of their political activity and the proportion of their time spent on political activity of any kind".⁵⁹⁶ [152] Apparently, once again, the Court's "carefu[l] revie[w of] the trial record"⁵⁹⁷ did not extend to reading what these people actually said under oath, or comparing their testimony to the parties' stipulations of fact. For, if the Court had taken these elementary steps, it could not rationally (let alone legally) have concluded that this testimony was clear and convincing evidence of anything other than the utter incompetence and imbecility of the UTP's whole case. Detailed review of this testimony is therefore appropriate.⁵⁹⁸

In general, no documentary evidence supported the testimony, although such evidence was purportedly in existence and accessible to the UTP.⁵⁹⁹ In many instances, documents and testimony in the record,⁶⁰⁰ the parties' stipula-

⁵⁹⁶ CFF at 12.

⁵⁹⁷ *Id.* at 1.

⁵⁹⁸ See PFF Nos. 161-67.

⁵⁹⁹ "[O]ral testimony of the employees of a party to litigation pertaining to long past events is to be regarded with caution." *Toldeo Scale Corp. v. Westinghouse Electric Corp.*, 351 F.2d 173, 179 (6th Cir. 1965). *Accord*, *Schnaier v. Farr*, 99 F.2d 968, 972 (Ct. Cust. & Pat. App. 1938). The UTP's failure to produce documentary evidence to support the testimony of these witnesses makes the adverse-inference rule particularly appropriate for application here. *E.g.*, *UAW v. NLRB*, 459 F.2d 1329, 1335-36, 1338, 1345 (D.C. Cir. 1972).

⁶⁰⁰ *E.g.*, the testimony of the several UniServ Directors was grossly inconsistent with the UTP's own *Qualitative and Quantitative Evaluation of UniServ*. PRS Nos. 535, 537, 539, 698, 1629-30. See *ante*, note 315. This alone suffices to discredit the testimony. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-96 (1948).

tions,⁶⁰¹ [153] or information obtained in other litigation⁶⁰² contradicted the witnesses' testimony or impugned their veracity. And all of the testimony concerning allocations of working-time rested on retrospective "estimates", "guesses", and "supposition", rather than on demonstrable, objective facts.⁶⁰³

⁶⁰¹ *E.g.*, the testimony of the several UniServ Directors purported to contradict stipulations that neither NEA nor MEA can determine how such Directors have allocated their working-time. PRS Nos. 86-102. This alone suffices to discredit their testimony, if not to disallow it altogether. *See, e.g.*, *Leizerowski v. Eastern Freightways, Inc.*, 514 F.2d 487, 490 (3d Cir. 1975); *Ringling Brothers-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 119 F.2d 584, 586 (9th Cir. 1941). *See also* *Andrews v. St. Louis Joint Stock Land Bank*, 127 F.2d 799, 804 (8th Cir. 1942); *Hooker Chem. & Plastics Corp. v. United States*, 591 F.2d 652, 665 (Ct. Cl. 1979); *Air-Exec, Inc. v. Two Jacks, Inc.*, 584 F.2d 942, 944 (10th Cir. 1978); *United States v. Sherman*, 576 F.2d 292, 296 (10th Cir. 1978); *E.H. Boly & Sons, Inc. v. Schneider*, 525 F.2d 20, 23 & n.5 (9th Cir. 1975); *United States v. Harding*, 475 F.2d 480, 484 (10th Cir. 1973); *Thrash v. O'Donnell*, 448 F.2d 886, 889 n.7 (5th Cir. 1971); *Mull v. Ford Motor Co.*, 368 F.2d 713, 715-16 (2d Cir. 1963); *McNamara v. Miller*, 210 F.2d 565, 571 (3d Cir. 1954); *Hard v. Stevens*, 65 F.R.D. 637, 639-40 (E.D. Pa. 1975).

⁶⁰² *E.g.*, information Plaintiffs' counsel obtained in another case showed that, at trial, the UTP misrepresented the involvement of MEA's UniServ Directors in political activism, and NEA's Regional Director Helstad gave false or misleading testimony. Plaintiffs' Motion to the Special Master to Re-Open the Trial Record, and for Sanctions Against the United Teaching Profession Defendants (3 February 1981), at 7-10, 10-23.

⁶⁰³ Testimony based upon "estimates" and "guesses", without supporting documentation, is not probative of what percentage of its program an organization devotes to "collective bargaining". Report of Wilson K. Barnes, Special Master, *Beck v. CWA*, No. M-76-839 (D. Md., report filed 18 August 1980), at 17-21, 1980

Specifically, the UTP's counsel asked the Lester Prairie Education Association's President Anderson to "*estimate* what percentage [of his time as President] is involved with Government Relations [*i.e.*, political] Activity". He answered, "just a *guess* might be 10 to 20 percent of the time".⁶⁰⁴

[154] MEA's Assistant Director of Government Relations Bresin claimed that he spent about a month each year on MEA's Political Action Data Project (political organizing), the congressional and legislative contact-teams (lobbying), and IMPACE.⁶⁰⁵ But he also admitted that he kept no time-sheets, diary, or log of his activities—except for a billing-statement to IMPACE, which the UTP did not produce at trial.⁶⁰⁶ Bresin also proffered an estimate of the political involvement of UniServ Directors prior to 1978.⁶⁰⁷ He admitted, however, that he based this estimate on "discussions with them [*i.e.*, UniServ Directors] about our jobs and what we did", not on any review of the Directors' re-

Daily Lab. Rep. No. 166, D-1, at D-6 to D-7, *applying First-Amendment standard of* *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). And mere parole evidence alone is generally insufficient to meet the clear-and-convincing-evidence standard when documentary evidence exists, but is withheld. *E.g.*, *Morris v. Holland*, 259 S.W.2d 948, 952-53 (Mo. Ct. App. 1975).

⁶⁰⁴ T. at 2319-20 (emphasis supplied).

⁶⁰⁵ *Id.* at 1906-09 (cross-examination). Referring to the Political Action Data Project, he said that "[i]t would be very difficult to give a percentage. * * * I would estimate it's taken a couple of hours in the past year". *Id.* at 1907.

⁶⁰⁶ *Id.* at 1925-26 (redirect examination).

⁶⁰⁷ *Id.* at 1915 (cross-examination). Prior to November, 1977, Bresin had served as a UniServ Director. After that date, he served as MEA's Assistant Director of Governmental Relations.

ports or timesheets.⁶⁰⁸ And other suspicious testimony about his political [155] activities while a UniServ Director thoroughly undermined Bresin's credibility.⁶⁰⁹

The UTP's counsel asked NEA's Organizing Specialist Banks to "*estimate* . . . on an annual basis" the time he spent on political activities. He answered, "in 1980—less than five percent, I *guess*, if I work on my math".⁶¹⁰ He admitted that he kept copies of his "activity reports" (time-records), but did not bring the reports to trial or review the reports prior to his testimony, and conceded that he could not use the reports to reconstruct how he had spent his time on a day-by-day basis.⁶¹¹

The UTP's counsel asked MCCFA's President Durham to "attempt to describe on a percentage basis annually" his involvement with IMPACE. He answered, "it would be

⁶⁰⁸ *Id.* at 1925-26 (redirect examination). Respecting the reports and time-sheets, Bresin added that "I don't believe there are such things".

Bresin estimated the political involvement of UniServ Directors at less than 5% of their time, purportedly by comparison with his own experience in that position prior to 1978. This claim is obviously inconsistent with—if not incredible in light of—his assignment as MEA's Assistant Director of Governmental Relations, a position almost exclusively concerned with political activities. *See id.* at 1926-27 (redirect examination).

⁶⁰⁹ Bresin categorically denied that, as a UniServ Director, he had ever received or distributed IMPACE materials; or solicited, received, or transmitted IMPACE contributions. T. at 1880-81. The *MEAdvocate*, however, contains a story, with pictures, identifying several "MEA members" from the White Bear Lake/North St. Paul/Maplewood UniServ unit who "worked with UniServ Director Ken Bresin to collect the money" for IMPACE in 1974. *MEAdvocate*, Vol. 12, No. 21, at 2 (1 Jun. 1974).

⁶¹⁰ T. at 5311 (cross-examination) (emphasis supplied).

⁶¹¹ *Id.* at 5317-18 (redirect examination).

very difficult in terms of the percentage".⁶¹² Questioned by Plaintiffs' counsel about the amount of time he spent on general organizational duties, he answered, "Well, a lot of time is spent on that. Maybe half. *Who can say? I don't know*".⁶¹³ Durham later admitted that he maintained no time- [156] sheets, daily logs, diaries, or "any specific record" of his activities.⁶¹⁴ And respecting MCCFA's involvement in negotiations with community-college officials, he conceded that "there is no record". "I don't know whether management kept a record of the hours or not. We didn't." ⁶¹⁵

The UTP's counsel asked MCCFA's Governmental Relations Committee Chairman Enockson to "provide us with your best *estimate*" of time spent on governmental-relations activities and grievance-processing. He answered that "I *probably* spent more time processing grievances"—but admitted he kept no time-sheets or diary.⁶¹⁶

The UTP's counsel asked MEA's Executive Director Gallop to "provide us with your best *estimate*" of time spent on political activity. He answered, "I *suspect* in the last dozen years I *probably* would spend, maybe five percent of my time".⁶¹⁷ He conceded, though, that he had kept no time-sheets, logs, day-books, or any other form of documentation of his time, and that his estimates "are really guesses".⁶¹⁸

⁶¹² *Id.* at 648 (cross-examination). The UTP's counsel twice referred to Durham's remarks as "estimates". T. at 648, 649.

⁶¹³ *Id.* at 669 (redirect examination) (emphasis supplied).

⁶¹⁴ *Id.* at 5381 (cross-examination).

⁶¹⁵ *Id.* at 5384-85 (cross-examination).

⁶¹⁶ *Id.* at 1630-31 (emphasis supplied).

⁶¹⁷ *Id.* at 2742043 (cross-examination) (emphasis supplied).

⁶¹⁸ *Id.* at 2757-58 (redirect examination).

Asked by the UTP's counsel to "*estimate* the proportion of time" expended on political activism, NEA's Regional Director Helstad answered, "[i]t would have to be an *estimate*".⁶¹⁹ The UTP's counsel himself referred to Helstad's "*estimate*" as "*that best guess of yours*".⁶²⁰ And Helstad's testimony on [157] the subject was a mass of evasion, misrepresentation, and outright falsehood.⁶²¹

MEA's Director of Governmental Relations Mammenga gave his "*best estimate*" of time spent on IMPACE as "*something like ten percent*".⁶²² Inconsistently, though, he admitted that IMPACE paid 25 to 30% of his salary.⁶²³ And he conceded that review of his diary would not be useful because of "*the superficiality of the diary*".⁶²⁴

The UTP's counsel asked MEA's Deputy Executive Director Palmer what percentage of his time he spent on political activism. He answered, "*I suppose one or two percent*".⁶²⁵ Palmer also purported to "*estimate*" the involvement of UniServ Directors in politics, based on his annual evaluation of the Directors and his receipt of monthly reports from them.⁶²⁶ The UTP did not proffer any UniServ evaluations or reports as trial-exhibits, however.

The UTP's counsel asked UniServ Director Bennett to give his "*best reasonable estimate*" and "*basic best recall*"

⁶¹⁹ *Id.* at 960-61 (cross-examination) (emphasis supplied).

⁶²⁰ *Id.* at 962 (cross-examination) (emphasis supplied).

⁶²¹ See Plaintiffs' Motion to the Special Master to Re-Open the Trial Record, and for Sanctions Against the United Teaching Profession Defendants (3 February 1981), at 10-23.

⁶²² T. at 2126-27 (cross-examination) (emphasis supplied).

⁶²³ *Id.* at 2137 (redirect examination).

⁶²⁴ *Id.* at 2137-38 (redirect examination).

⁶²⁵ *Id.* at 2914 (cross-examination) (emphasis supplied).

⁶²⁶ *Id.* at 2913-14 (cross-examination).

of his involvement in partisan politics each year.⁶²⁷ Bennett admitted that he maintained an activity-calendar, and had filled out yearly NEA surveys on his activities, but was not requested [158] to and did not bring these documents to trial.⁶²⁸ He also conceded that he had never used his calendar to make a quantitative analysis of his time, said "[i]t would be difficult" to perform such an analysis in a meaningful way, and testified that "I really don't believe that there are sufficient documents in any form in any place . . . that would justify a quantitative answer any closer than what I've given. They are just not available".⁶²⁹ Other suspicious testimony also undermined Bennett's credibility.⁶³⁰

UniServ Director Berg said she had a calendar from which she "could pretty well estimate the time on a percentage basis". Asked by Plaintiffs' counsel how she could accomplish the calculation, she admitted she didn't know.⁶³¹

⁶²⁷ *Id.* at 3904 (cross-examination).

⁶²⁸ *Id.* at 3880-81, 3883-84.

⁶²⁹ *Id.* at 3884-85, 3907 (redirect examination).

⁶³⁰ Bennett claimed that MEA's Political Action Data Project information had been "lost . . . in the computer", "the retrieve capability had been destroyed or lost", "[t]hree months ago". *Id.* at 3846-51. Bennett testified on 19 September 1980. Therefore, according to him the "destruction" or "loss" of the information occurred in mid-June of that year. IMPACE's Board of Directors member Boutiette, however, testified that he had requested, *and received within two weeks' time of his request*, Political Action Data Project mailing labels in late August. *Id.* at 3970-74.

⁶³¹ *Id.* at 3300-02:

Q. You think you could tell me per year the number of hours you spent on any particular job related to your role as a UNISERV director within five hours?

A. I could tell you on a percentage basis.

Q. Well, how do you calculate the percent unless you start off with a number of hours you were in job A, or the total num-

[159] Asked by the UTP's counsel to "provide us your best *estimate* on an annual basis" of time spent on partisan politics, UniServ Director Bernard answered "in the neighborhood of one percent", adding "I think I could prove it if I had to".⁶³² Bernard admitted, however, that he had not taken even the first step to "prove it", before or at trial.⁶³³

Asked by Plaintiffs' counsel if she had any records to substantiate her claims as to allocation of time, UniServ Director Fields admitted she had various records and docu-

ber of hours you were doing anything. Don't you have to tell the number of hours spent in job A or B or C in order to calculate a percentage?

A. I don't know that. Not that kind of calculating.

⁶³² *Id.* at 3155-56 (cross-examination) (emphasis supplied).

⁶³³ *Id.* at 3166-68 (redirect examination):

Q. * * * I think you said, "I could prove it if I have to." Well, let's just assume that you have to. How would you go about proving it?

A. Well, the best way I can do it is to reconstruct my work over a particular period of time. I keep a calendar * * *. I go to meetings that are easy to identify. I am an advocate in grievance arbitrations, which are easy to pinpoint. I meet with individual teachers, which I can document. That's basically the way I would go about it. I don't keep an exhaustive log.

Q. But you would, in essence, go back to the records * * * and put all this material together and come up in some way with an analysis of the days that, at least, were recounted in those materials?

A. That's correct.

Q. Have you done that in preparation for your testimony here?

A. Not in terms of sitting down in a lot of detail, no.

ments in her office, her house, and her car—but had not brought any of them into court.⁶³⁴

[160] Asked by the UTP's counsel to "describe * * * on an annual basis the percentage of your time" spent on political activism, UniServ Director Hyland answered, "if I did it in percents I would *guess* probably like two percent".⁶³⁵ Hyland admitted that he kept no time-sheets, daily log, or diary—only a calendar that he had not brought to court, and had last reviewed "two years ago".⁶³⁶

UniServ Director Marinkovitch admitted that he kept no

⁶³⁴ *Id.* at 4834-36.

⁶³⁵ *Id.* at 3353-54 (cross-examination) (emphasis supplied).

⁶³⁶ *Id.* at 3348, 3357 (redirect examination):

Q. * * * If your life depended on proving those percentages, just how would you go about doing that? What documents would you use? What method of calculation would you use?

A. I couldn't prove it absolutely if my life depended on it. I could come fairly close by using my calendar, and off the top of my head just what meetings I had that may not have even been on that calendar * * * and lay them out and pretty well estimate how time I spent.

Q. In order to prove it within the limits of accuracy that you could, you'd have your calendar there to say that on the 3d of May you were at such and such a meeting * * * ? Isn't that right?

A. Yes.

Q. You didn't bring the calendar today?

A. No, I don't have it today.

Q. Nobody asked you to bring the calendar today, did they?

A. No.

[161] time-sheets or diaries, and that he could not use his calendar accurately to reconstruct his activities.⁶³⁷

Asked by the UTP's counsel "to give a *rough estimate*" of the time spent on political action, UniServ Director Moen responded, "That would be hard to say. * * * it would be at the outside five percent".⁶³⁸ Moen admitted, however, that he kept no time-sheets, log, or diary—even conceding "I don't keep detailed records".⁶³⁹ Then, questioned by Plaintiffs' counsel as to how he would establish what his activities had been, Moen testified as follows:

A. Well, I would have to start with that monthly calendar. I suppose I would have to go and look at minutes of the UNISERV Board and see when they met and how long, then I would have to * * * see when we had negotiation sessions * * * and I would have to look at letters that I have written to teachers who have inquired about some contract provision. *I'm not sure how I would go about putting together a summary of my time.*

Q. * * * prior to coming here today you didn't perform any investigation of that kind?

A. No, not any great detail.⁶⁴⁰

Asked by the UTP's counsel to "give us your *estimate*" of time spent on "governmental relations activities of any

⁶³⁷ *Id.* at 3941-43:

Q. * * * if someone said all of a sudden you get to charge NEA \$100 an hour and MEA, and so forth, now bill it out. Could you do that?

A. No way, I wish it were that easy.

⁶³⁸ *Id.* at 3513 (cross-examination) (emphasis supplied).

⁶³⁹ *Id.* at 3513-14, 3515 (redirect examination).

⁶⁴⁰ *Id.* at 3515-17 (redirect examination) (emphasis supplied).

[162] kind", UniServ Director Watson answered, "[o]ne percent or less".⁶⁴¹ This estimate, however, she purportedly based on an analysis of "appointment books" she failed to bring to court, and which the UTP's counsel did not produce.⁶⁴² These suspicious circumstances, coupled with Watson's other, false testimony on political involvement, rendered her credibility nil.⁶⁴³

⁶⁴¹ *Id.* at 4701 (cross-examination) (emphasis supplied).

⁶⁴² *Id.* at 4703, 4704-05. Apparently, this was part of the UTP's strategy of "attempting to introduce only those documents produced during discovery within the discovery deadline which would fall under December 31, 1978. * * * We're not producing documents that Plaintiffs haven't seen before". *Id.* at 4965-66 (remarks of the UTP's counsel). However, the percentage of time Watson spent on political action was for the UTP to establish, by competent evidence, if it thought such a showing would constitute a defense to Plaintiffs' claims. Plaintiffs were not required, through discovery or otherwise, to establish that the UTP could not prove that percentage. *See, e.g.*, *Henry Hanger & Display Fixture Corp. v. Sel-O-Rak Corp.*, 270 F.2d 635, 642 (5th Cir. 1959). Even less were Plaintiffs required, through their own discovery, to develop a record suitable for the UTP's later use at trial. That Plaintiffs may not have requested production of Watson's appointment books prior to or at trial does not excuse the UTP from itself disgorging those books if it wished to rely on Watson's testimony as a defense. *Cf. Kasar v. Miller Printing Machinery Co.*, 36 F.R.D. 200, 203 (W.D. Pa. 1964).

⁶⁴³ Watson testified that she participated in no workshops, training-sessions, or other activities related to the 1980 Minnesota precinct-caucuses. T. at 4658. She also said that she had not cooperated with UniServ Director Zagrabelny in any activities directed towards involving UTP members in politics. *Id.* at 4690. Zagrabelny, however, identified Watson as one of several UniServ Directors who had attended an NEA training-session on precinct-caucus involvement, and who had worked directly with her on planning for political organizing in Minnesota. *Id.* at 2412, 2414-15.

Asked by the UTP's counsel to "give us your best *estimate*" of time spent on political action, UniServ Director Zagrabelny answered, "I would venture to *guess* that it be no more than ten percent of my total time".⁴⁴ Questioned by Plain- [163] tiffs' counsel, she admitted that the figure was only a "guesstimate".⁴⁵

The testimony of UniServ Director Wicks is particularly illustrative of the incompetence of the UTP's attempts to show how much working-time various officials and staff-personnel expended on "politics". Wicks testified concerning his staff-activities for MEA during the time-period of the trial in this case. In support of this testimony, the UTP

⁴⁴ *Id.* at 2452-53 (cross-examination) (emphasis supplied).

⁴⁵ *Id.* at 2462 (redirect examination). The following testimony further illuminates the meaninglessness of Zagrabelny's "guesstimate":

Q. * * * you have never sat down with that log of yours, have you, and gone back and said, "I'm going to go back and calculate just how many hours I spend in 1979, or 1980, doing A, B, C, D, E" whatever those things are. Have you ever done that?

A. No. I see no purpose to do it.

* * *

Q. If you went back to this calendar of yours, do you have it filled out in such a way that you could go through and come up with a figure that was something other than a guess? That is, do you have it figured out so that you could go back from the first day of January 1980, let's say, to today and know what in fact you put in, whatever it was, 1,000 hours all told and of that 750 hours were spent in negotiations, 200 hours were spent in grievance adjustment, 100 hours was spent in IMPACE screening and precinct caucuses? Is the log that close?

A. No, it is not.

Id. at 2462-63 (redirect examination).

proffered as trial-exhibits copies of pages supposedly from Wicks' appointment-book and calendar.⁶⁴⁶ Yet, the UTP did not even attempt to establish that the activities in which Wicks [164] allegedly engaged during this time-period were representative of his activities over the much longer time-period relevant to this case.⁶⁴⁷ Rather, Wicks' testimony indicated the opposite.⁶⁴⁸

Moreover, much of Wicks' activities involved general organizational duties, such as preparation for and attendance at MEA's staff- and council-meetings, Board of Directors meetings, local-level and UniServ workshops and training-sessions for officials and faculty representatives, and MEA's yearly leadership-training workshop.⁶⁴⁹ As the UTP offered no evidence that would permit content-analyses of these meetings, Wicks' testimony concerning his mere attendance at them proved little or nothing about the political character of MEA.

In addition, Wicks admitted that several entries in his appointment-book and calendar saying nothing about political activity actually involved such activity.⁶⁵⁰ And cer-

⁶⁴⁶ UTP Exhibits Nos. 48-49.

⁶⁴⁷ Because Plaintiffs contend that the UTP is a political-action or dominantly political organization, the relevant time-period for analysis of the activities of its staff-personnel is the four-year political cycle, including (in the case of MEA) IMPACE collections each spring, and candidate-screening and electoral activities each summer and fall in even-numbered years.

⁶⁴⁸ At the time of trial, MEA and several of its local-level affiliates were involved in a special activity called "Project Win". See T. at 4539-40, 4542, 4545, 4553-54.

⁶⁴⁹ *E.g.*, *id.* at 4537-40, 4551-54, 4565-66, 4570-75, 4576-78.

⁶⁵⁰ *Id.* at 4600-06, 4630-32, 4635-39. These admissions establish the UTP's failure to delineate the political from nonpolitical aspects of Wicks' staff-assignment, even during the truncated time-period under consideration.

tain of [165] Wicks' alleged record-keeping practices were palpably implausible, suggesting that the records he produced at trial were fabricated especially for this case.⁶⁵¹

The testimony of the various UniServ Directors was also entitled to little or no weight because it purported to contradict explicit stipulations entered into by the UTP to the effect that neither NEA nor MEA has records enabling either of them to determine the amounts of time that UniServ Directors anywhere in the United States, including Minnesota, have expended on partisan politics, lobbying, public relations, litigation, political organizing, or collective bargaining.⁶⁵²

Furthermore, even if their "estimates" and "guesses" of how they allocated their time were correct, the testimony of these UTP witnesses would be entitled to little or no weight on the factual issue of the UTP's political involvement, because they claimed to spend the majority of their time performing general, undifferentiated managerial, administrative, or staff functions for MEA, MCCFA, or UniServ.⁶⁵³ [166] This testimony, even if credited, did not es-

⁶⁵¹ The UTP's counsel, for example, repeatedly questioned Wicks about the number of telephone-calls he had made or received on various days, as shown in his calendar. *Id.* at 4540-41, 4542, 4546, 4547, 4551, 4553, 4555, 4557, 4560, 4563, 4565, 4566, 4568, 4569, 4570, 4574, 4575, 4577, 4578, 4579, 4580. On cross-examination by Plaintiffs' counsel, however, Wicks admitted that he really "didn't know" why he kept such a record, that he was not sure the record was "of any value at all", and that he was unable to determine by or to whom the calls were made. *Id.* at 4610-14.

⁶⁵² PRS Nos. 86-102. *See ante*, notes 367-79 & accompanying text.

⁶⁵³ Durham, T. at 669-71 ("maintaining the organization"), *see* 5350-55; Gallop, *id.* at 2742-44, 2758-59 ("managing the operation of MEA"); Palmer, *id.* at 2914 ("administration of the UNISERV program"); Bernard, *id.* at 3156 ("help the organization remain organized"); Zagrabelny, *id.* at 2453 ("just dealing with day to

tablish what the organizational units have done. Moreover, the testimony of these UTP witnesses would still be entitled to little or no weight on the factual issue of the UTP's political involvement, because much of the UTP's program concededly depends upon the voluntary, unpaid participation of its rank-and-file members; and the UTP proffered no evidence that the allocations of time to which its officials and staff-personnel testified accurately represented or reflected the extent of participation in the UTP's programs and activities by its members.⁴⁵⁴

day individual problems that local Associations have''); Wicks, *id.* at 4600-06, 4630-32, 4635-39. *See* Palmer, *id.* at 2884 (UniServ Directors have "an overall responsibility for all the [MEA] program areas").

⁴⁵⁴ For example, MCCFA's President Durham's alleged time-allocations with respect to IMPACE-activities, even if credited, admittedly did not represent or reflect the real commitment of effort in that area by other UTP officials, staff-personnel, and members generally. *Id.* at 668-69:

- Q. You don't have to do much in relation to IMPACE because others are doing the real legwork, isn't that true?
- A. The IMPACE people take care of their operation.
- Q. That's right. In fact, IMPACE goes and finds what they call Chairpeople, don't they, to make the collections?
- A. Chairpeople and liaisons. They find those people, yes.
- Q. And generally speaking, you're not one of those people?
- A. That's correct.
- Q. So, no one is asking you on a regular basis to make collections for IMPACE, are they?
- A. That's correct.
- Q. And in fact those collections go on and without a great deal of legwork from you, don't they?
- A. The IMPACE collections are taken care of by other people.

[167] Finally, although the "estimates" and "guesses" of these UTP witnesses are entitled to little or no weight in support of the UTP's defense, some of their testimony constituted admissions of the UTP's substantial involvement in political activism, in support of Plaintiffs' case.⁶⁵⁵

In short, far from constituting clear and convincing evidence of the level of the UTP's involvement in political activism, the testimony of its officials and staff-personnel again and again revealed that the UTP had no satisfactory qualitative or quantitative means of establishing what that level has been.

All in all, then, this Court's reliance on the testimony of the UTP's witnesses, and on its "many exhibits", is erroneous as a matter of law—because that testimony and those exhibits, even where admissible, did not provide even "substantial evidence" of what the UTP had to prove.

III. ANALYSIS OF THIS COURT'S FINDINGS SHOWS THAT THEY ARE FALSE, MISREPRESENT THE RECORD, ARE IRRELEVANT, OR SUPPORT PLAINTIFFS' CONTENTIONS, NOT THOSE OF THE UNITED TEACHING PROFESSION.

Besides their many demerits as a matter of law, this Court's findings on the issues of the UTP's integrated structure and predominantly political character are defective because [168] they purport to state "facts" the record demonstrates are false; misrepresent the true import of

⁶⁵⁵ Anderson, *id.* at 2319-20 (10 to 20% of time spent on governmental-relations activity); Bennett, *id.* at 3903 (10% of training-activity devoted to "caucus workshops"); Bresin, *id.* at 1906-09 (almost all time spent on partisan politics and lobbying); Gallop, *id.* at 2743 (5 to 10% of time spent on partisan politics and lobbying); Mammenga, *id.* at 2126-27 (10% of time spent on IMPACE, "great mass" of time spent lobbying). Anything more than 5% falls within the area of substantial expenditure of time on political activism. See Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 345 (1978).

facts the record does establish; contradict each other, or belie the Court's ultimate conclusions; are against the clear weight of the undisputed evidence; and, even where correct, self-evidently support Plaintiffs' contentions, not those of the UTP.

A. This Court's findings establish only that the United Teaching Profession is integrated.

In § II.A. of its findings,⁶⁵⁶ this Court catalogues certain selected facts, and makes other *non*-factual statements, that it claims prove the separateness of MCCFA, MEA, NEA, IMPACE, and NEA-PAC. Amazingly, these findings never once used the appellation "United Teaching Profession", or even suggest that such a thing exists. That the UTP does exist, and that MCCFA, MEA, NEA, IMPACE, and NEA-PAC are its integral parts, however, is beyond question.⁶⁵⁷ Moreover, careful review of the Court's own findings on the subject provides further support for that conclusion:⁶⁵⁸

NEA is a national *voluntary* organization of teachers, governed by *its* Representative Assembly, Board of Directors and Executive Committee, **THAT HAS BOTH STATE AND LOCAL AFFILIATES. THROUGH RECIPROCAL MEMBERSHIP REQUIREMENTS AS A CONDITION OF AFFILIATION, MEMBERS OF A LOCAL OR STATE AFFILIATE MUST BECOME MEMBERS OF THE**

⁶⁵⁶ CFF at 4-8.

⁶⁵⁷ See *ante*, pp. 44-51.

⁶⁵⁸ Hereinafter, Plaintiffs will indicate in *italic* type those portions of the quoted findings that are false, misleading, or have no support in the record; and will indicate in **BOLD FACE** type those portions of the findings that support Plaintiffs' contentions. Portions of the findings that appear in regular roman contain irrelevant, or merely descriptive material with no particular significance to the matters at issue here.

NEA AND OF BOTH THE STATE AND LOCAL AFFILIATES.⁶⁵⁹

[169] Obviously, NEA cannot be a "voluntary" organization if it has a *unified* membership with its state- and local-level affiliates.⁶⁶⁰ Indeed, the Court's own description of the UTP's "reciprocal membership requirements" belies that characterization. In addition, the Court's reference to NEA's governing bodies as "*its* Representative Assembly", and so on, misrepresents the controlling influence that state- and local-level units of the UTP have over those bodies. Most importantly, though, the Court's (correct) finding that "reciprocal membership requirements" exist among the UTP's local, state, and national level indicates *integration* in the UTP, not separateness, as a matter both of organizational science,⁶⁶¹ and of the legal principles of organizational integration.⁶⁶²

THE PRINCIPAL POLICYMAKING BODY OF THE NEA IS ITS REPRESENTATIVE ASSEMBLY, COMPRISED OF MEMBERS OF THE NATIONAL, STATE AND LOCAL ASSOCIATIONS. NEA'S PROGRAM BUDGET, CONSTITUTION, BYLAWS AND STANDING RULES, AND RESOLUTIONS WITH RESPECT TO ISSUES AND GOALS ARE ALL VOTED UPON BY THE REPRESENTATIVE ASSEMBLY. IT ALSO ELECTS THE PRESIDENT, VICE PRESIDENT, SECRETARY, TREASURER, AT-LARGE MEMBERS OF THE BOARD OF DIRECTORS, AND THE AT-LARGE MEMBERS OF THE EXECUTIVE COMMITTEE.⁶⁶³

⁶⁵⁹ CCF at 4.

⁶⁶⁰ See PFF at 45 & nn.51-52.

⁶⁶¹ See *id.* Nos. 39, 41.

⁶⁶² LAI at 9 & n.26.

⁶⁶³ CFF at 4-5.

That NEA's Representative Assembly, "the primary legislative and policymaking body" of the UTP's national level,⁶⁶⁴ is composed of "delegates of state and local affiliates" (not simply "members", as the Court states)⁶⁶⁵ indicates *integration*, not separateness, as a matter both of organizational [170] science,⁶⁶⁶ and of legal principle.⁶⁶⁷ The Court, of course, is wrong in saying that the Representative Assembly elects "at-large members of [NEA's] Board of Directors", there being no "at-large members" of that body.⁶⁶⁸ But the remainder of its description of how the Representative Assembly controls all aspects of NEA's operations, together with its admission that the UTP's local- and state-level units comprise that Assembly, conclusively indicates *integration*, not separateness, as a matter of law.⁶⁶⁹

*Only the NEA may amend its constitution and by-laws, which are separate from those of MEA or MCCFA. The NEA is the exclusive employer of its professional staff and such staff are not subject to supervision by any staff of MEA and MCCFA. No state or local affiliate has any authority over any collective bargaining agreement entered into by the NEA with its professional staff. NEA sets its own budget and no affiliate has authority to interfere with such determinations.*⁶⁷⁰

⁶⁶⁴ 1977-78 NEA Handbook (UTP Exhibit No. 7) at 11.

⁶⁶⁵ *Id.*

⁶⁶⁶ PFF at 17 n.45.

⁶⁶⁷ LAI at 6 n.18, 8 n.22, 9-10 & n.28, 11 nn.37-38, 13 & n.47.

⁶⁶⁸ 1977-78 NEA Handbook (UTP Exhibit No. 7) at 12.

⁶⁶⁹ LAI at 12 & n.42, 13 & n.47.

⁶⁷⁰ CFF at 5.

Every statement here misrepresents the true situation. First, as the Court admits in its immediately previous finding, NEA's Representative Assembly controls the content of "its" constitution and bylaws—and the Assembly is the creature of the UTP's state- and local-level affiliates. Therefore, a proper description of what goes on would be that "only delegates from the UTP's state- and local-level affiliates, acting through the Representative Assembly, may amend NEA's constitution and bylaws". But, stated this way, the arrangement [171] self-evidently proves *integration*, not separateness. Second, although NEA's constitution may be physically "separate" from MEA's and MCCFA's, it is not separate as a matter of organizational science, law, or even common sense—for, as a condition of affiliation, the constitutions of the latter two sub-units must be compatible with that of the former,⁶⁷¹ and meet certain minimum standards outlined in NEA's by-laws.⁶⁷² Third, the statements that NEA is the "exclusive employer" of its staff, and exercises sole "authority over any collective bargaining agreement" with that staff, once more disregard the ultimate control the state- and local-level affiliates have, through NEA's Representative Assembly and Board of Directors,⁶⁷³ to select all officers and staff-personnel of NEA, and to control their activities. This relationship indicates integration, as a matter of law.⁶⁷⁴ In any event, the existence of divisions of labor, responsibility, and authority at different levels of a complex organization is not inconsistent with the mutual integration of those levels, as a matter either of organizational science⁶⁷⁵ or of

⁶⁷¹ PRS No. 473.

⁶⁷² 1977-78 *NEA Handbook* (UTP Exhibit No. 7) at 171-72.

⁶⁷³ *Id.* at 12.

⁶⁷⁴ LAI at 13 & n.48.

⁶⁷⁵ PFF No. 41 & n.44.

law.⁶⁷⁶ And fourth, the contention that “NEA sets its own budget”, without “interfere[nce]” from its affiliates, simply blinks the Court’s previous findings that the Representative Assembly controls the budget, and that the UTP’s state- and local-level units control the Representative Assembly.

[172] In sum, in agreement with the UTP’s own stipulation,⁶⁷⁷ even the few “facts” the Court carefully selects to rationalize its conclusion show that NEA is its state and local affiliates, and that NEA’s entire organizational being is the product of what those affiliates do through their delegates to the national-level Representative Assembly and their representatives on that level’s Board of Directors. In conjunction with the other overwhelming evidence in the record,⁶⁷⁸ then, the foregoing findings support only one legal and rational conclusion: namely, that NEA is an integral part of the UTP, a conclusion to which even the UTP subscribed by explicit stipulation.⁶⁷⁹

The MEA is a statewide voluntary organization of teachers that operates under the direction of its own Representative Assembly, Board of Directors and Executive Committee, all of which are separate from the representative and delegate assemblies, boards and committees of the NEA and MCCFA. THE MEA HAS DIVIDED THE STATE INTO VARIOUS GEOGRAPHIC REGIONS AND OTHER UNITS KNOWN AS UNISERV UNITS, EACH OF WHICH SERVES ONE OR MORE LOCAL ASSOCIATIONS. EVERY UNISERV UNIT, INCLUDING THE MCCFA, IS

⁶⁷⁶ LAI at 20 & n.84.

⁶⁷⁷ PRS No. 418b.

⁶⁷⁸ PFF Nos. 25-56.

⁶⁷⁹ PRS No. 405.

ENTITLED TO REPRESENTATION ON THE MEA'S BOARD.⁶⁸⁰

The first sentence in this finding is a mass of misrepresentations. For example, MEA is a "voluntary" organization only in the sense that NEA is: It has a *unified* membership-and dues-structure.⁶⁸¹ Even MEA's membership-card "certifies [the holder] as an MEA member in good standing, at all levels [173] of the United Teaching Profession".⁶⁸² But this indicates *integration* among MEA and the other "levels of the United Teaching Profession", not separateness, as a matter of law.⁶⁸³ And again, MEA's Representative Assembly, Board of Directors, and Executive Committee are not "separate" from the assemblies and boards of NEA and MCCFA, but are intimately interconnected therewith,⁶⁸⁴ as anyone but a blind man can see on inspection of the charts introduced at trial to summarize the testimony of the UTP's own witnesses.⁶⁸⁵ Indeed, the Court's own subsequent statement that "[e]very UniServ unit, including the MCCFA, is entitled to representation on the MEA's Board" belies the claim that an interlocking *inter-level* governance-structure does not exist. The second sentence in its finding is also partly false, as the creation of UniServ units in Minnesota, and throughout the United States, is a cooperative effort between the UTP's state and national levels.⁶⁸⁶ In any event, the mere existence of UniServ indicates pervasive integration between MEA, NEA, and

⁶⁸⁰ CFF at 5.

⁶⁸¹ PRS Nos. 440, 443, 452.

⁶⁸² *Id.* No. 444 (emphasis supplied).

⁶⁸³ LAI at 9 & n.26.

⁶⁸⁴ PFF 41, 45 & nn.54-55; PRS Nos. 455-56, 485-89, 493-97.

⁶⁸⁵ PTE Nos. 4-5, 10, 29, 102.

⁶⁸⁶ *See* PRS No. 716.

their local-level affiliates.⁶⁸⁷ In particular, the UniServ Policy Guidelines admit that the very purpose of UniServ is to implement, improve, and coordinate programs of the UTP.⁶⁸⁸ MEA's by-laws provide that each UniServ unit in Minnesota must promote MEA's objectives, [174] programs, and purposes.⁶⁸⁹ And the UTP has stipulated that nothing in the operation of the UniServ program may be inconsistent with NEA's or MEA's organic documents or programs.⁶⁹⁰ Finally, the last sentence in this finding refutes the first, by showing that MEA's "own" Board of Directors is, in fact, the creature of MEA's local-level affiliates, including MCCFA⁶⁹¹—which, of course, indicates *integration*, not separateness.⁶⁹²

*MEA has its own constitution and bylaws, which it alone may amend. Such amendment does not require approval by the NEA or any local affiliate.*⁶⁹³

The misrepresentation here is subtly implicit. Although the Court does not mention it, MEA's Delegate Assembly has full power to amend MEA's articles of incorporation (*not* "constitution") and bylaws—but that Assembly is the creature of MEA's local-level affiliates, including MCCFA.⁶⁹⁴ Moreover, MEA's organic documents must comply with NEA's standards for affiliation, or subject MEA to disaf-

⁶⁸⁷ PFF Nos. 48-49; LAI at 14 & nn.52, 56. See PRS Nos. 535-43.

⁶⁸⁸ PRS No. 498.

⁶⁸⁹ *Id.* No. 540.

⁶⁹⁰ *Id.* Nos. 560, 562.

⁶⁹¹ *Id.* Nos. 488-89. See PTE No. 4.

⁶⁹² LAI at 6 n.18; 9-10 & n.28; 11-12 & nn.37-40; 12-13 & nn.42-47, 50-51.

⁶⁹³ CFF at 5.

⁶⁹⁴ PRS Nos. 485, 493.

filiation from the UTP.⁶⁹⁵ So, any amendment in MEA's organic documents requires explicit "approval" by its local-level affiliates collectively, and must receive at least tacit "approval" from NEA if MEA is to remain affiliated therewith. That this constitutes an indicium of integration among the three levels is obvious.

[175] *MEA's staff operate under the direction of MEA's executives and is separate from the staff of NEA and MCCFA, although some MEA staff may be assigned to assist affiliates, including MCCFA.*⁶⁹⁶

Again, the Court's purported finding is a conglomeration of confusion. To be sure, MEA's executives direct MEA's staff. But all of MEA's local-level affiliates, through their participation in MEA's Delegate Assembly, Board of Directors, Councils, and so on,⁶⁹⁷ control MEA's officers and staff. Therefore, a more relevant statement from the perspective of organizational integration would be: "MEA's staff operate under the *immediate* direction of MEA's executives, but under the *ultimate* control of the representatives of MEA's local-level affiliates, including MCCFA". Phrased this way, though, the statement correctly shows the high degree of integration among MEA and its local affiliates, not the "separateness" the Court disingenuously projects. (Of course, in any event, the existence of divisions of labor, responsibility, and authority among various staff-personnel at different levels of the UTP is not inconsistent with integration.⁶⁹⁸) Moreover, MEA's staff is *not* separate from MCCFA's. Rather, MCCFA's single staff-man is also

⁶⁹⁵ PRS Nos. 473, 545, 549, 551, 554, 557-58.

⁶⁹⁶ CFF at 5.

⁶⁹⁷ See PRS Nos. 485, 487-89, 493-97, 568, 594; PTE Nos. 4, 10, 102.

⁶⁹⁸ PFF at 16 & n.44, 19 & nn.53-54; LAI at 20 & n.84.

on MEA's staff, operates under the joint supervision of MEA and MCCFA,⁶⁹⁹ and is jointly financed by MEA and NEA.⁷⁰⁰ And even without joint positions and supervision, MEA'S [176] provision of staff-personnel to its local-level affiliates would indicate integration.⁷⁰¹

*MEA's boards, committees and assemblies determine its program budget and other expenditure decisions, without any power of review by the NEA or local affiliates.*⁷⁰²

This statement completely distorts the true situation. "MEA's boards, committees and assemblies" consist of *representatives* of its "local affiliates".⁷⁰³ Therefore, the "local affiliates" can and do collectively *control* MEA, absolutely and pre-emptively, not simply "review" its (that is, *their own*) actions after the fact. This is a very important, if not decisive, indicium of integration.⁷⁰⁴

In sum, even the few "facts" the Court selects to rationalize its conclusion show that MEA is the creature of its local-level affiliates, and that MEA's entire organizational being is the product of what those affiliates do through their delegates to MEA's Delegate Assembly and their representatives on its Board of Directors, Councils, and so on. In conjunction with the other overwhelming evidence in the record, then, the foregoing findings support only one legal and rational conclusion: namely, that MEA is an integral

⁶⁹⁹ PRS Nos. 598-99.

⁷⁰⁰ *Id.* No. 1046.

⁷⁰¹ LAI at 14 & n.56, 17 & n.68.

⁷⁰² CFF at 5.

⁷⁰³ PRS Nos. 485, 487-89, 493-97, 568, 594; PTE Nos. 4, 10, 102.

⁷⁰⁴ LAI at 11-13 & nn.37-51.

⁷⁰⁵ PRS Nos. 405, 408, 409, 416.

part of the UTP, a conclusion to which even the UTP subscribed by explicit stipulations.⁷⁰⁵

The MCCFA is a *voluntary* organization of community college faculty members operating [177] under the direction of its own Delegate Assembly, Board of Directors and Executive Committee. AS AN AFFILIATE OF THE MEA AND NEA, MCCFA REQUIRES ITS MEMBERS TO BECOME MEMBERS OF MEA AND NEA.⁷⁰⁶

Once more, the Court's admission of *unified* membership among MCCFA, MEA, and NEA indicates integration, not separateness, and shows the true extent to which MCCFA is a "voluntary" association.⁷⁰⁷ In addition, the existence of unified membership exposes as illogical the Court's statement that MCCFA has "its own" governing bodies. After all, because MCCFA is *and must be* itself composed of members of MEA and NEA, it would be equally correct to say that MEA members, or NEA members, or both control MCCFA.

MCCFA'S RELATIONSHIP WITH THE NEA AND MEA IS SET FORTH IN THE AFFILIATION AGREEMENT BETWEEN THESE ORGANIZATIONS. UNDER THIS AGREEMENT, MCCFA MEMBERS PAY "UNIFIED DUES" TO THE MCCFA, MEA AND NEA. THE DEDICATION OF A PORTION OF SUCH DUES TO MEA AND NEA IS IN EXCHANGE FOR STAFF, OFFICE AND OTHER ASSISTANCE TO MCCFA. *Extensive evidence was submitted with respect to accounting for the budgets and allocations between the organizations. The evidence established that at least 75% of MCCFA members dues are expended by or on direct behalf of*

⁷⁰⁵ CFF at 5.

⁷⁰⁷ See PRS Nos. 446-47.

*MCCFA. The portion allocable to the MCCFA is higher if regular indirect MEA and NEA assistance, or emergency aid such as strike assistance, is included.*⁷⁰⁸

Here the Court repeats a variation of the familiar "unity" theme: *unified dues*.⁷⁰⁹ It fails to see, however, that a formal contractual relationship establishing unified dues indicates integration, not separateness,⁷¹⁰ and that the [178] exchange of monies for services (even without a unified-dues structure) also indicates integration.⁷¹¹ Furthermore, the Court's reliance on what it calls "[e]xtensive evidence" purportedly establishing an allocation of MCCFA's dues among MCCFA, MEA, and NEA is both misplaced and beside the point: misplaced, because the "[e]xtensive evidence" to which the Court refers is, in actuality, the fraudulent concoction of the UTP's counsel, which all of the UTP's witnesses questioned on the subject disavowed and discredited;⁷¹² and beside the point, because MCCFA, MEA, and NEA would still be integrated even if they each collected no dues, or if each spent 100% of the dues it collected on activities at its own level of the UTP. Revealing as well is the misunderstanding the Court displays of the financial relationships among these UTP units when it suggests that "strike assistance" is part of "MCCFA member dues". Actually, MEA's "strike assistance" comes from a so-called "crisis fund" consisting of special contributions in addition to, not part of, regular UTP membership-dues.

⁷⁰⁸ CFF at 6.

⁷⁰⁹ See PRS Nos. 448-52.

⁷¹⁰ LAI at 15 & n.58.

⁷¹¹ *Id.* at 15-17 & nn.58-71.

⁷¹² *Ante*, pp. 119-25, 149-50

THE AUTHORITY OF MCCFA TO MAINTAIN THE AUTONOMY SPECIFIED UNDER ITS CONSTITUTION, TO CONDUCT ITS OWN MEETINGS, TO ELECT ITS OWN OFFICERS AND TO ADOPT ITS OWN POLICIES, ARE ALSO PROVIDED FOR IN THE AFFILIATION AGREEMENT.⁷¹³

Here, indeed, is an amazing statement in supposed support of the "separateness" of MCCFA, MEA, and NEA: MCCFA exercises some amount of "autonomy" *because MEA and NEA permit it to do so pursuant to a legally binding arrangement among the three units!* What could better illustrate MCCFA's integration in [179] the UTP than the finding that such "autonomy" as it exercises is a product of the agreement incorporating it in the UTP, and has no other source?! If X has authority to act in ways A, B, and C, but not in ways D, E, and F, only because of agreement with Y and Z, then have not Y and Z determined X's authority as much as X has? And if, for purposes of this illustration, one defines "integration" as "shared ability to define authority", are not X, Y, and Z obviously and inextricably integrated as long as their agreement remains in force?

*MCCFA's constitution and bylaws are separate from those of MEA and NEA. MCCFA's bylaws may be amended only by its membership. MCCFA's board of directors, officers and member assemblies are all separate from those of MEA and NEA.*⁷¹⁴

That MCCFA's organic documents are *physically* separate from those of MEA and NEA is true. But the statement obscures the real legal and organizational relationship among the three units by failing to describe how MCCFA's

⁷¹³ CFF at 6.

⁷¹⁴ *Id.*

constitution and by laws *must be compatible with NEA's and MEA's*.⁷¹⁵ This requirement makes them anything but "separate" in the sense meaningful to the question of organizational integration. To be sure, MCCFA's members are empowered to amend its bylaws. But those individuals are also members of MEA and NEA, making it perfectly reasonable (and more relevant to the issues in this case) to say that some of MEA's members and NEA's members control the content of MCCFA's organic documents. Finally, far from being "separate" from the governing-bodies of MEA and NEA, MCCFA's "board of directors, officers and member assemblies" integrate in a complex fashion into the various assem- [180] blies, boards, councils, committees, and so on of MEA and NEA.⁷¹⁶ Any child can see this.⁷¹⁷

*MCCFA alone determines the scope, content, subject matter and direction of its collective bargaining with MSBCC. NEA and MEA have no authority to determine or participate in the determination of such matters by MCCFA.*⁷¹⁸

These statements carefully overlook the assignment of one of MEA's staff-men as MCCFA's Executive Director—the *only* person from MEA or NEA, the UTP has stipulated, who participates in "meet[ing] and negotiat[ing]" in the community colleges.⁷¹⁹ Thus, MCCFA does not "alone" determine anything in this area. Rather, its officials act co-operatively with one of MEA's staff who, of course, is subject at least in part to supervision by MEA.

⁷¹⁵ PRS Nos. 473-74, 491, 548.

⁷¹⁶ *Id.* Nos. 485-86, 488-89, 492-96.

⁷¹⁷ PTE Nos. 4-5, 29, 102.

⁷¹⁸ CFF at 6.

⁷¹⁹ PRS Nos. 49-50. *See id.* No. 598.

In sum, even the few "facts" the Court selects to rationalize its conclusion show that MCCFA is inextricably involved with MEA and NEA by way of unified membership and unified dues, and because of the affiliation-agreement among the three. In conjunction with the other overwhelming evidence in the record, then, the foregoing findings support only one legal and rational conclusion: namely, that MCCFA is an integral part of the UTP, a conclusion to which the UTP subscribed by explicit stipulations.⁷²⁰

[181] IMPACE is a voluntary, nonprofit committee of individual educators WHICH MAY BE CHARACTERIZED AS MEA'S POLITICAL ACTION ARM. ITS BOARD OF DIRECTORS ARE APPOINTED BY THE MEA BOARD OF DIRECTORS. THE IMPACE BOARD EXERCISES GENERAL SUPERVISION AND CONTROL OF ITS ORGANIZATION, INCLUDING ALL DETERMINATIONS OF FINANCIAL CONTRIBUTIONS TO THE CAMPAIGNS OF CANDIDATES FOR PUBLIC OFFICE IN MINNESOTA.⁷²¹

That, as the Court admits, IMPACE is MEA's "political action arm" is, in and of itself, decisive for establishing integration between them.⁷²² The Court's attempt to whitewash the relationship by using the verb "may be characterized" cannot obscure the mound of record-evidence demonstrating that no one in the UTP thinks of IMPACE as anything but MEA's "arm" or "tool".⁷²³ That MEA controls the selection of IMPACE's Board of Directors is also legally conclusive of the relationship between MEA

⁷²⁰ *Id.* Nos. 405-07, 417.

⁷²¹ CFF at 6.

⁷²² LAI at 10-11 & nn.29-36. *See* PFF No. 47.

⁷²³ PRS Nos. 505-05a, 506a-08, 509b, 511, 514-15, 517, 520; PTE No. 63.

and IMPACE,⁷²⁴ and, again, is the subject of no doubt within the UTP.⁷²⁵ And that "the IMPACE board exercises general supervision" over IMPACE's operation is, of course, irrelevant on the one hand, and indicative of integration on the other. On the one hand, it would make little practical sense for MEA to create IMPACE⁷²⁶ with a subservient board of MEA's own hand-picked appointees, and then to interfere with the day-to-day operations of that board. On the other hand, in order to protect MEA from legal complications arising out of IMPACE's activities in funnelling monies to [182] candidates' campaigns,⁷²⁷ it makes all the sense in the world for MEA to permit IMPACE to function without interference other than manipulation of IMPACE's board itself. In short, MEA needed a compliant tool to perform activities the law says it cannot perform directly. So, it created IMPACE with a "separate" board of directors composed of MEA's stooges who could be expected to perform their assigned tasks in robot-like fashion on MEA's behalf. The mere existence of this board, to accomplish that task, establishes integration between MEA and IMPACE. It only exacerbates the situation to note, as did IMPACE's Chairman, that "the IMPACE Board of Directors is probably the most effective and successful working board or committee the MEA has",⁷²⁸ the "first obligation [of IMPACE's board] is to operate in such a manner that MEA goals automatically become our goals",⁷²⁹ and that IMPACE intends to "continue to operate in total conformity with the wishes of the

⁷²⁴ LAI at 12 n.42.

⁷²⁵ PRS Nos. 511, 520-21, 525-28, 530.

⁷²⁶ PRS Nos. 505-05a.

⁷²⁷ See *id.* No. 510-11.

⁷²⁸ *Id.* No. 515.

⁷²⁹ *Id.* No. 520.

MEA and in total unison with the goals and objectives of the parent organization".⁷³⁰

MEMBERSHIP IN AND CONTRIBUTIONS TO IMPACE ARE WHOLLY VOLUNTARY AND DISTINCTLY SEPARATE FROM MEMBERSHIP IN OR CONTRIBUTIONS TO MEA, NEA OR MCCFA.⁷³¹

As far as contributions for the support of candidates' campaigns are concerned, this statement may be correct. But why does the Court suppose, wrongly, that it indicates the "separateness" of IMPACE from the rest of the UTP? The law prohibits organizations such as MEA from collecting monies for distribution to [183] candidates' campaigns. For that reason, MEA created IMPACE as MEA's "political-action arm".⁷³² No better indicium of integration exists in the law than that unit *X* created unit *Y* to perform a task that, but for *Y*, *X* could not accomplish.⁷³³ After all, even a layman is conversant enough with anatomy to know that an "arm" is *part* of a "*body*", not a separate entity.

*IMPACE has sole authority over its funding decisions and other activities. IMPACE CONTRACTS AND PAYS FOR THE SERVICES OF CERTAIN MEA STAFF MEMBERS TOGETHER WITH PAYING MEA FOR IMPACE'S OFFICE SPACE AND OTHER SUPPORT SERVICES.*⁷³⁴

The first sentence in this finding grossly misrepresents the situation. As explained above, no one connected with IM-

⁷³⁰ *Id.* No. 521.

⁷³¹ CFF at 6.

⁷³² PRS Nos. 505-05a, 510-11, 517, 521, 527.

⁷³³ LAI at 10-11 & nn.33-35.

⁷³⁴ CFF at 6.

PACE believes other than that IMPACE exercises its "authority" in total conformity with MEA's goals and objectives. After all, the whole purpose of IMPACE is to provide monies to the campaigns of candidates who support MEA's legislative demands.⁷³⁵ As an article in MEA's own newspaper pointed out, IMPACE's "authority" as to the funding of candidates is mythical:

Would IMPACE ever support a candidate opposed by the MEA or refuse to back one the MEA favored?

"No," answered [IMPACE's Chairman] concisely.

It could happen, said [MEA's Executive Director] with a laugh. "Just once."⁷³⁶

And as to its "other activities", IMPACE also evidences little "authority" to act on its own. For example, IMPACE depends on [184] MEA's staff-personnel, UniServ Directors, and network of rank-and-file political activists throughout Minnesota to collect its contributions, to "screen" (interview) candidates, and to propagandize its endorsements.⁷³⁷ It even employs MEA members to deliver its contributions to the candidates.⁷³⁸ The second sentence in the finding, although true, indicates integration, not separateness.⁷³⁹ Certainly it is not inconsistent with integration,⁷⁴⁰ especially where the law requires political-action committees and their parent organizations carefully to

⁷³⁵ PRS Nos. 518-30.

⁷³⁶ *Id.* No. 563.

⁷³⁷ PFF Nos. 52 & n.62, 64 & n.81, 65 & nn.84-85, 66 & n.88; PTE Nos. 6, 28, 63, 96.

⁷³⁸ PRS No. 806a.

⁷³⁹ LAI at 16 & nn.60-62, 17 & nn.67-71.

⁷⁴⁰ *Id.* at 20 & n.84.

segregate monies that directly support candidates' campaigns.

IMPACE has no authority to participate in or exercise influence over budget, program, collective bargaining or other regular operations of NEA, MEA, or MCCFA.⁷⁴¹

In a very narrow sense, this may be true. It obviously is false if one properly considers what IMPACE contributes to candidates' campaigns as part and parcel of the "regular operations" of the UTP. In any event, the fact (if it is such) is irrelevant. The purpose of IMPACE is to collect money for candidates; and that is what it does. It is a special-purpose unit of the UTP. That it does not do what its founders did not intend it to do simply confirms that it is doing what they established it to do: promoting the UTP's interests by funding electoral campaigns.⁷⁴²

[185] In sum, even the few "facts" the Court selects to rationalize its conclusion show that IMPACE and MEA are two sides of the same coin, or (as even the Court admits) the "arm" and the body. In conjunction with the other overwhelming evidence in the record, then, the foregoing findings support only one legal and rational conclusion: namely, that IMPACE is an integral part of the UTP.

NEA-PAC * * * is a national voluntary, nonprofit committee of teachers WHICH MAY BE CHARACTERIZED AS NEA'S POLITICAL ACTION ARM. *It is governed by its own Steering Committee which determines which campaigns of candidates for federal office shall receive financial contributions. The NEA-PAC Steering Committee and NEA officers and directors are separate entities. IMPACE CHAIRMAN,*

⁷⁴¹ CFF at 7.

⁷⁴² PRS Nos. 518-30.

ROGER JOHNSON, IS A MEMBER OF THE NEA-PAC COUNCIL BY VIRTUE OF HIS IMPACE CHAIRMANSHIP.⁷⁴³

That, as the Court admits, NEA-PAC is NEA's "political action arm" is, in and of itself, decisive for establishing integration between them.⁷⁴⁴ Again, as with IMPACE and MEA, the Court attempts to camouflage the relationship between NEA-PAC and NEA by using the verb "may be characterized", as if the record did not reveal that "NEA-PAC is a creature of the National Education Association",⁷⁴⁵ and nothing else. The Court's statement that NEA-PAC "is governed by *its own* Steering Committee" is no mere camouflage, though. Rather, it is a glaring misrepresentation. Who makes up NEA-PAC's "own" Steering Committee? Why, among others, NEA's President, Vice President, and Treasurer,⁷⁴⁶ and two individuals appointed by [186] NEA's Board of Directors.⁷⁴⁷ Moreover, NEA's President is the Chairman of the Steering Committee; and, in his absence NEA's Vice President performs that function.⁷⁴⁸ In addition, NEA's Executive Director, General Counsel, and Director of Government Relations serve as consultants to the Committee.⁷⁴⁹ *This* is a group "independent" of NEA?! Anyone who can read an organizational diagram can see immediately that such is not the case.⁷⁵⁰ Next, claims the Court with even greater detachment from

⁷⁴³ CFF at 7.

⁷⁴⁴ LAI at 10-11 & nn.29-36. See PFF No. 46.

⁷⁴⁵ PRS No. 501.

⁷⁴⁶ *Id.* No. 582.

⁷⁴⁷ *Id.* No. 581.

⁷⁴⁸ *Id.* No. 584.

⁷⁴⁹ *Id.* No. 583.

⁷⁵⁰ PTE No. 63.

common sense, let alone the record, NEA-PAC's Steering Committee and NEA's officers and directors are "separate entities". Really? *When they are the same people?! When NEA's President, for example, serves in that capacity he is a "separate entity" from himself when he serves as Chairman of NEA-PAC's Steering Committee?* But only by penning such an impossibility can the Court avoid the obvious legal implication that NEA and NEA-PAC are integrated because the selfsame individuals occupy "commanding positions in the interlocking * * * structure".⁷⁵¹ Of course, perhaps the Court means that NEA's Board of Directors or Executive Committee have no ability to control or influence NEA-PAC. This, too, is wrong: Actions to revise NEA-PAC's guidelines require approval by NEA's Board of Directors;⁷⁵² and NEA-PAC's budget may not [187] become final without approval by NEA's Executive Committee.⁷⁵³ This makes NEA-PAC "independent" of NEA?! Then, notes the Court, IMPACE's Chairman is a member of NEA-PAC's Council (as are representatives from each of the "political-action arms" of the UTP's other state-level units). This, of course, indicates integration between IMPACE and NEA-PAC,⁷⁵⁴ as anyone can deduce on sight from an organizational diagram.⁷⁵⁵ At least it should so indicate to a person who had made a sufficiently "carefu[l] revie[w]" of the record to know that NEA-PAC's Council decides which candidates NEA-PAC will support,⁷⁵⁶ as opposed mistakenly to believing that that is the task of NEA-PAC's Steering Committee.

⁷⁵¹ LAI at 12-13 & nn.44-46.

⁷⁵² PRS No. 574.

⁷⁵³ *Id.* No. 588.

⁷⁵⁴ LAI at 12-13 & nn.44-46.

⁷⁵⁵ PTE No. 63.

⁷⁵⁶ PRS Nos. 585, 589.

MEMBERSHIP IN AND CONTRIBUTION TO
NEA-PAC IS WHOLLY VOLUNTARY AND DIS-
TINCTLY SEPARATE FROM MEMBERSHIP IN
OR CONTRIBUTION TO NEA, MEA OR MCCFA.⁷⁵⁷

As with the Court's similar comment regarding IMPACE, this statement may be correct in a narrow sense. But, as with IMPACE and MEA, rightly understood it imports integration between NEA-PAC and NEA, not "separateness".⁷⁵⁸

NEA-PAC has no authority to participate in or exercise influence over budget, [188] program, collective bargaining or other regular operations of NEA, MEA or MCCFA.⁷⁵⁹

As with the Court's similar observation respecting IMPACE, this statement is false if one properly considers NEA-PAC's support of candidates' campaigns as part and parcel of the "regular operations" of the UTP. In so far as the statement means that NEA-PAC has nothing to do with "regular operations" of the UTP other than such political contributions, it is irrelevant to the issue of integration. The *raison d'être* of NEA-PAC is to collect and disburse campaign-monies to candidates; and that is what it does. That it does not do what its founders did not intend it to do simply confirms that it is performing its special purpose: promoting the UTP's interests by funding electoral campaigns.⁷⁶⁰

In sum, even the few "facts" the Court selects to rationalize its conclusion show that NEA-PAC and NEA, and NEA-PAC and IMPACE, are intimately interconnected.

⁷⁵⁷ CFF at 7.

⁷⁵⁸ *Mutatis mutandis*, see ante, notes 731-33 & accompanying text.

⁷⁵⁹ CFF at 7.

⁷⁶⁰ PRS Nos. 503-03.

In conjunction with the other overwhelming evidence in the record, then, the foregoing findings support only one legal and rational conclusion: namely, that NEA-PAC is an integral part of the UTP.

* * * *In limited circumstances*, NEA, MEA, MCCFA, NEA-PAC and IMPACE PROVIDE TO OR SHARE WITH ONE ANOTHER VARIOUS SERVICES AND FACILITIES. *Such sharing of services, facilities or staff is generally financed by each separate organization to the extent such organization directly benefits from the particular sharing arrangement.* OFFICIALS, STAFF PERSONNEL AND REPRESENTATIVES OF NEA, MEA, MCCFA, NEA-PAC AND IMPACE REGULARLY ATTEND MEETINGS WITH ONE ANOTHER, PLAN CERTAIN CO-OPERATIVE PROGRAMS, REPORT TO THEIR RESPECTIVE ORGANIZATIONS CONCERNING THE ACTIVITIES OF THE OTHER ORGANIZATIONS, AND MAINTAIN CONTINUOUS [189] CHANNELS OF COMMUNICATIONS AMONG THEMSELVES. IN SPECIAL CASES, THE DEGREE OF SUPPORT FOR AN AFFILIATE MAY BE QUITE SUBSTANTIAL * * *. ⁷⁶¹

The Court's characterization of the sharing of "various services and facilities" among the UTP's many units as obtaining only "[i]n limited circumstances" misrepresents the broad extent of this cooperation.⁷⁶² Also, the Court apparently forgets that such sharing indicates integration, not separateness.⁷⁶³ Revealingly, the Court says nothing about the many stipulations to the effect that the UTP's various units consider themselves *interdependent*, and believe that the success of each one's programs depends on

⁷⁶¹ CFF at 7.

⁷⁶² PFF No. 55.

⁷⁶³ LAI at 17 & nn. 67-71.

the others' actions.⁷⁶⁴ This, too, is a strong indicium of integration.⁷⁶⁵ The Court's further comment that sharing of services and facilities within the UTP "is generally financed by each separate organization" has no support in the record. Surely, even the Court does not believe that the UTP's phoney "allocation" of MCCFA membership-dues provides satisfactory evidence of this pipe-dream.⁷⁶⁶ In any event, much of the "sharing" that goes on among the units involves the voluntary, *unpaid* services of the UTP's rank-and-file members—particularly in the areas of partisan politics and lobbying.⁷⁶⁷ And, even if true, [190] "separate financing" of each unit's activities would not be inconsistent with integration among all the units.⁷⁶⁸ The Court then notes that the units cooperatively interact and maintain continuous communication *inter sese*. So the record showed.⁷⁶⁹ But, once again, this demonstrates their mutual integration.⁷⁷⁰ And that, as the Court admits, "support for an affiliate may be quite substantial" obviously enhances such a demonstration.

MCCFA, MEA AND NEA ARE RELATED BY THEIR AGREEMENT OF AFFILIATION, BY HAVING *certain* COMMON GOALS AND BY *occasional* SHARING ARRANGEMENTS. *They are not and do not function or operate, however, as a single integrated unit. In making this finding, we have con-*

⁷⁶⁴ PRS Nos. 633-714.

⁷⁶⁵ LAI at 14 & nn.52-53.

⁷⁶⁶ *See ante*, pp. 119-25, 149-50.

⁷⁶⁷ *See* PRS Nos. 742a-989d; PTE Nos. 3-4, 10, 23, 28, 47, 49, 59, 63, 70, 72, 74, 96, 119-20.

⁷⁶⁸ *See* LAI at 20 & n.84.

⁷⁶⁹ PFF No. 56.

⁷⁷⁰ LAI at 13 & nn.50-51, 18 & nn.72-75.

*sidered the testimony of Professors Schneier and Morgan, presented by plaintiffs, and the record as a whole. Each organization has a separate board of directors, officers, committees, constitution and bylaws. Each organization maintains exclusive control over its budget, program activity and general policy-setting process. Each organization maintains separate and exclusive control over its professional staff and management operations. Each organization maintains separate and exclusive control over its collective bargaining determinations. The record thus shows that MCCFA, MEA and NEA are not a single integrated organization. The record also establishes that IMPACE and NEA-PAC are separate POLITICAL ACTION COMMITTEES OF MEA AND NEA, RESPECTIVELY. Because membership in or contribution to IMPACE and NEA-PAC are wholly voluntary and separate from any participation in MCCFA, MEA or NEA, IMPACE and NEA-PAC are also not part of any single integrated organization.*⁷⁷¹

This purported finding merely summarizes in conclusory fashion the Court's misstatements or misrepresentations [191] of fact, or misinterpretations of the legal significance of facts, that Plaintiffs have exploded immediately heretofore. The Court, however, at this point claims to have "considered" the testimony of Plaintiffs' expert-witnesses in organizational science, and "the record as a whole". Obviously, its use of the magic words "the record as a whole" merely supplies further window-dressing for a conclusion which the Court should know is purely fictional. And, as Plaintiffs have already shown in detail, the Court's "consider[ation]" of the testimony of the expert-witnesses in this area is no more realistic than the Court's conclusion.⁷⁷²

⁷⁷¹ CFF at 7-8.

⁷⁷² See ante, pp. 44-51.

Plaintiffs' expert-witness, Professor Schneier, gave an unchallenged scientific opinion that MCCFA, MEA, NEA, IMPACE, and NEA-PAC "are very highly integrated to the point of oneness. They act * * * as one organization. * * * [C]ertainly beyond any reasonable doubt * * * the units function as one organization".⁷⁷³ He based this judgment on the standard criteria of organizational science, including "leader awareness", "leader acquaintance", "leader interaction", "information exchange", "resource exchange", "overlapping groups or boards", "joint programs", "written agreements", "common rules, policies, and procedures", "common plans, schedules, or forecasts", "formal communications across units", "liaison roles", "temporary task forces or special groups", "permanent groups", "linking managerial positions", and "matrix design".⁷⁷⁴ He applied these criteria to the record.⁷⁷⁵ And he found each of them [192] satisfied,⁷⁷⁶ *beyond any reasonable doubt*.⁷⁷⁷ The Court's own confused and truncated findings, as previously discussed, concede (in other words) the existence throughout the UTP of "leader awareness", "leader acquaintance", "leader interaction", "information exchange", "resource exchange", "joint programs", "written agreements", "common plans, schedules, or forecasts", and "formal communications across units". The Court nonetheless asserts, though, that the UTP has no "overlapping groups or boards", "common rules, policies, and procedures", or "linking managerial positions". But Plaintiffs have just demonstrated that exactly the opposite is true. And the Court's findings say nothing at all about whether the UTP exhibits "liaison roles", "temporary task

⁷⁷³ PFF No. 37.

⁷⁷⁴ *Id.* No. 34.

⁷⁷⁵ *Id.* No. 35.

⁷⁷⁶ *Id.* No. 36.

⁷⁷⁷ *Id.* No. 37.

forces or special groups", "permanent groups", or "matrix design"—although "the record as a whole" overflowed with examples of each of these things. *If* this Court had seriously "considered" the expert-testimony, and actually compared it with "the record as a whole", or even simply reviewed that record alone from an informed and disinterested perspective, it would have been compelled by the facts, by the law, by logic, by common sense, and by a sense of fairness to find that *the UTP has admitted it is integrated, was proven by Plaintiffs to be integrated beyond any reasonable doubt, and adduced no meaningful evidence to the contrary.* The Court's quite opposite conclusion, then, manifests the Court's abject failure to [193] perform its proper function in this regard.

To say, then, that this Court's findings on the subject establish only that the UTP is integrated is an understatement of what they show to anyone who troubles to read "the record as a whole".

B. This Court's findings do not support its conclusion that the United Teaching Profession is a predominantly non-political organization.

In §§ II.B. and II.C. of its findings,⁷⁷⁸ this Court outlines certain selected facts, and makes other *non-factual* statements, that it claims prove the non-political character of the UTP—apparently, by "proving" that the UTP's political activities "relate to collective bargaining". Careful review of these findings, however, shows that such "proof" is conspicuous by its absence:

Since 1971, MCCFA has been the certified exclusive bargaining agent for the faculty of Minnesota's community colleges. MCCFA was actively engaged for over a year negotiating the 1973-75 collective bargaining contract with MSBCC. This accord was reached

⁷⁷⁸ CFF at 8-13.

without strike or arbitration. The 1975-77 and 1977-79 contracts were also negotiated by MCCFA for approximately one year each; both resulted in arbitration proceedings and awards; and, in both cases, the Minnesota Legislature failed to fully fund the arbitration award. MCCFA also negotiated the 1979-81 contract for nearly a year. In this case, a three-week strike resulted from a refusal by MSBCC to arbitrate the dispute.

The subject matter of these negotiations by MCCFA has included teaching loads, work assignments, salaries, leave policies, grievance procedures, seniority rights, fringe benefits, grounds for dismissal and the scope of arbitration.

- [194] Roughly one-half of MCCFA's annual budget is expended on the costs of operating its 22-person Board of Directors, its Executive Committee and the salary of its president. The president chairs meetings of the Board and Executive Committee, which take place at least monthly, appoints members and serves as an ex officio member of standing committees (Negotiations Committee, Meet and Confer Committee, Legislative Committee, Professional Growth Committee, Resolutions Committee and others), chairs the negotiation teams and serves generally as the chief spokesperson of MCCFA.⁷⁷⁹

This purported finding is merely descriptive, not probative of any issue in the case. Plaintiffs do not dispute that MCCFA is the "exclusive representative" in the community colleges—that, indeed, is the reason Plaintiffs have initiated suit against MCCFA and its companion-units in the UTP. Neither do Plaintiffs dispute that, as "exclusive representative" under color of PELRA, MCCFA has "me[t] and negotiate[d]" with college administrators over

⁷⁷⁹ *Id.* at 8-9.

terms and conditions of employment and other matters of public policy—that, indeed, is the reason Plaintiffs say PELRA as applied improperly delegates governmental authority to the UTP.⁷⁸⁰ Nor do Plaintiffs dispute that MCCFA has officers, committees, and so on—although the fact of their existence proves *nothing* about what these officers and committees have actually done from day to day.

THE MCCFA EXECUTIVE DIRECTOR IS SALARIED BY THE MEA, PURSUANT TO THE AFFILIATION AGREEMENT, BUT IS PRIMARILY INVOLVED IN grievance of MCCFA claims, MCCFA contract interpretation and negotiations and other MCCFA MATTERS.⁷⁸¹

[195] That MEA has assigned one of its salaried staffmen to be “primarily involved in * * * MCCFA matters” is further, albeit inadvertent, recognition by this Court of MEA’s integral relationship with MCCFA. And Plaintiffs do not dispute that, to some undefined degree, MCCFA’s Executive Director has engaged in negotiations and grievance-adjustment. This finding, though, does not purport to define *how much* of his working-activities on behalf of MCCFA related to such “collective bargaining”, as opposed to “politics”. Moreover, the finding does not even preclude the likelihood that more than 50% of all his working-time involved “politics”.⁷⁸²

Roughly one-fifth of the MCCFA budget is expended on its committee activities in such areas as negotia-

⁷⁸⁰ See post, pp. 226-47.

⁷⁸¹ CFF at 9.

⁷⁸² For example, if MCCFA’s Executive Director spent 60% of his time working for MCCFA, and 40% for MEA, he would be “primarily involved in * * * MCCFA matters”. But if he spent one-half of his time on behalf of MCCFA pursuing “political” activities, and three-quarters of his time on behalf of MEA in the same endeavors, then 60% of his total activities would be “political”, and only 40% “other”.

tions, meet and confer, LEGISLATIVE MATTERS and professional growth.⁷⁸³

Here, the Court admits that MCCFA has engaged in "political" activities, but fails to *quantify* the extent of that involvement, or the extent of MCCFA's involvement in any other area. Therefore, the finding, although descriptive, is not probative of MCCFA's non-political character.

*The testimony and exhibits relating to MCCFA activities clearly establish that nearly all such activities relate directly to collective bargaining, formulation of a bargaining position, contract administration or closely related organizational and professional growth.*⁷⁸⁴

[196] The Court does not define, and Plaintiffs (at least from reviewing the record) have no idea what constitutes, "organizational and professional growth [related to collective bargaining]". In any event, the Court's general quantitative conclusion that "nearly all" of MCCFA's activities "relate directly to collective bargaining" is not supported by "clear", "dim", or even *any* significant evidence in the record.⁷⁸⁵ For example, Plaintiffs' unrefuted content-analyses of the minutes of MCCFA's Board of Directors and of its newsletter demonstrated *with the only quantitative evidence in the record* that much of MCCFA's activities had nothing whatsoever to do with "meet[ing] and negotiat[ing]" or "meet[ing] and confer[ring]" under PELRA; and the UTP produced *no* contrary quantitative analysis of this kind.⁷⁸⁶ Again, the unchallenged testimony of Plaintiffs' expert-witness in accounting established the

⁷⁸³ CFF at 9.

⁷⁸⁴ *Id.*

⁷⁸⁵ *See ante*, pp. 119-25, 143-51.

⁷⁸⁶ PFF No. 138 & nn.233-34, 237-38; *id.* at 59 n.226.

absence of any meaningful accounting-evidence defining and quantifying MCCFA's activities, a judgment in which the UTP's own witness concurred.⁷⁸⁷ In addition, the testimony of UTP's own witnesses conceded the *non-existence* of any time-records showing what MCCFA's officials, staff-personnel, or members have done from day to day, even regarding negotiations.⁷⁸⁸ And MCCFA's various exhibits on the basis of which [197] the UTP's counsel attempted to argue that MCCFA is predominantly non-political in character were inadmissible,⁷⁸⁹ fraudulent,⁷⁹⁰ or incapable of segregating "political" from "collective-bargaining" activities.⁷⁹¹

In sum, the foregoing findings, while descriptive in some instances, either prove next to nothing about MCCFA's political involvement, or are not true.

MCCFA IS AFFILIATED WITH MEA, A STATE-WIDE ORGANIZATION OF LOCAL TEACHER AFFILIATES that represent more than half of the public school teachers in Minnesota.⁷⁹²

This statement, of course, indicates integration between MCCFA and MEA, by conceding that MEA is an organization composed "of" local affiliates such as MCCFA. If X is composed of Y and Z are not Y and Z integral parts of X? The finding says nothing about MCCFA's or MEA's political or non-political character, however.

⁷⁸⁷ *Id.* Nos. 145-50, 153-54.

⁷⁸⁸ *Id.* Nos. 134 & n.226, 161(iv-v). *See ante*, pp. 151-67.

⁷⁸⁹ PFF Nos. 168; 169 & nn.360, 362. *See id.* 171 & n.370.

⁷⁹⁰ *Id.* No. 172 & n.32. *See ante*, pp. 119-25, 149-51.

⁷⁹¹ PFF Nos. 145-50, 153 & nn.264-67, 154. *See ante*, pp. 143-49.

⁷⁹² CFF at 9.

MEA ASSISTS ITS AFFILIATES IN VIRTUALLY ALL AREAS IN WHICH THEY ARE ACTIVE. MEA has departments (paid staff of MEA) and councils (volunteer teacher members who receive only expenses) in the following areas, on which well over half of the MEA budget is expended: Negotiations, Teacher Rights, Field Services (including Uni-Serv), Instructional and Professional Development, Communications, Economic Services, and Governmental Relations. The activities of these departments and councils include training of teachers in grievance procedures, legal defense or promotion of teacher rights, research and consultation on the broad range of subjects treated in negotiations, consultation on arbitration matters, investigation of unfair labor practice charges, direct field staff assistance to local affiliates in all of [198] the foregoing areas, researching and organizing teacher education programs dealing with classroom skills and other professional development, and assembling insurance, travel and other group benefits. Roughly one-third of MEA's budget is expended on administration, governance and physical facilities, including offices, equipment, officer salaries and costs of Board Meetings and Representative Assemblies.⁷⁹³

Again, the initial statement in this finding indicates pervasive integration among MEA and "its" affiliates. Otherwise, the finding is merely descriptive. Of course "[t]he activities of [MEA's] departments and councils *include*" the various things the Court lists. But they *include* a great deal more besides—about which the Court is silent.⁷⁹⁴ The issue is: *How much activity that is "political" occurs in these Departments, Councils, and elsewhere throughout*

⁷⁹³ *Id.* at 9-10.

⁷⁹⁴ *E.g.*, PFF Nos. 57-97.

MEA? And on this matter, the Court's finding sheds no light at all. Neither is it relevant to state, as does the Court, that "[r]oughly one-third of MEA's budget is expended on administration, governance and physical facilities", without showing, as the Court fails to do, how much of these institutional expenses were allocable to "politics" or "collective bargaining". Plaintiffs have never disputed that MEA has Departments, Councils, administration, governance, and physical facilities. The mere existence of these things, though, proves *nothing* about MEA's level of involvement in political activism. More to the point are Plaintiffs' content-analyses of the minutes of MEA's Board of Directors and MEA's newspaper.⁷⁹⁵ But [199] about these, *the only quantitative evidence of their kind in the record*, the Court says nothing, or at least nothing that is correct.⁷⁹⁶

*The testimony and exhibits relating to MEA activities clearly establish that all but an insignificant portion of such activities relate directly to collective bargaining issues such as teacher salaries, fringe benefits, size of classes, job security and other aspects of teacher welfare.*⁷⁹⁷

This purported finding is patently false. The testimony and exhibits concerning MEA proved no such thing as the Court alleges.⁷⁹⁸ For example, Plaintiffs' unrefuted content-analyses of the minutes of MEA's Board of Directors, of MEA's newspaper, and of its press-releases demonstrated *with the only quantitative evidence in the record* that much of MEA's activities had nothing whatsoever to do with "meet[ing] and negotiat[ing]" under PELRA in the com-

⁷⁹⁵ PFF No. 138; PTE No. 129.

⁷⁹⁶ See *ante*, pp. 66-69.

⁷⁹⁷ CFF at 10.

⁷⁹⁸ See *ante*, pp. 112-18, 137-43, 151-67.

munity colleges or anywhere else.⁷⁹⁹ And the UTP produced *no* contrary quantitative analysis of this kind. Again, the unchallenged testimony of Plaintiffs' expert-witness in accounting established the *absence* of any meaningful accounting-evidence defining and quantifying MEA's activities, a judgment in which the UTP's own witness concurred.⁸⁰⁰ In addition, the testimony of the UTP's own witnesses conceded that any quantification of the working-time officials and staff-personnel of MEA expended on "collective bargaining", "politics", or any other subject was no more than a *guess*, because accurate (or even any) records [200] allocating such time did not exist, or were withheld by the UTP.⁸⁰¹ And MEA's various exhibits on the basis of which the UTP's counsel attempted to argue that MEA is predominantly non-political in character were inadmissible,⁸⁰² or incapable of segregating "political" from "collective-bargaining" activities.⁸⁰³

The finding is also hopelessly equivocal, in terms of the legal standard the Court employs. The Court talks of MEA's activities "relat[ing] directly to collective bargaining *issues*". What does this mean? If the Court intends to imply that those activities "relate to collective bargaining ('meet[ing] and negotiat[ing]')", either in the community colleges or anywhere else, the record provided no support for the finding. If the Court intends to imply that those activities relate to subject-matters that may be at issue in "collective bargaining", the finding does not support the Court's ultimate conclusion that the MEA is non-political in character. For example, if MEA supplied campaign-work-

⁷⁹⁹ PFF No. 138 & nn.233-34, 236-68.

⁸⁰⁰ *Id.* Nos. 145-50, 152, 154.

⁸⁰¹ *Id.* Nos. 151, 152(ii, vi, viii-xviii), 163-67. *See ante*, pp. 151-67.

⁸⁰² PFF Nos. 158, 159 & nn.360-61, 170 (v), 171.

⁸⁰³ *Id.* Nos. 152, 154. *See ante*, pp. 112-31.

ers in support of a candidate who promised to introduce legislation providing increased "salaries, fringe benefits, * * * and other aspects of teacher welfare", or if MEA lobbied for such legislation, its actions would "relate directly to collective bargaining *issues*", because such things as "salaries, fringe benefits * * * and other aspects of teacher welfare" are some of the subjects of "meet and negotiate" under PELRA. But those actions would not "relate to collective bargaining" under [201] *Abood*, because they would not be "an integral part of the bargaining process".⁸⁰⁴ All of MEA's activities could "relate directly to collective bargaining *issues*", and still be political in nature. Indeed, if "collective bargaining issues" include "teacher welfare"; if teachers are citizens; and if the Democratic and Republican Parties are concerned with promoting the "welfare" of citizens—then, the Court could say that all of the activities of those Parties "relate directly to collective bargaining *issues*", and be just as correct, or just as wrong, as when it says the same thing about MEA. In short, the Court's test is operationally meaningless, because it provides no rational basis for differentiating between the situation that no one denies the First and Fourteenth Amendments proscribe (that is, where the "exclusive representative" is the Democratic or Republican Party) and the situation involved here. Therefore, the finding that rests upon that test is equally devoid of useful meaning.

THE MEA DIRECTLY ASSISTED THE MCCFA DURING THE LATTER ORGANIZATION'S 1979 STRIKE ACTION. MEA GRANTED MCCFA \$200,000 TO MAINTAIN STRIKE FACILITIES, PAID \$100 PER WEEK TO STRIKING FACILITY MEMBERS AFTER THE TENTH DAY OF THE STRIKE, AND, TOGETHER WITH NEA, GUARANTEED APPROXIMATELY \$300,000 IN LOANS

⁸⁰⁴ See *ante*, pp. 58-64.

TO THE STRIKERS. THIS STRIKE AID ALONE
EXCEEDED THREE YEARS OF MCCFA DUES
TO MEA.⁸⁰⁵

This finding provides further evidence of integration among MCCFA, MEA, and NEA.⁸⁰⁶ But it says nothing about the allegedly non-political character of MEA. What it does emphasize, however, is the extent to which MCCFA, MEA, and NEA have cooperated in using MCCFA's position as "exclusive [202] representative" in the community colleges to undermine the sovereignty of the State of Minnesota, to thwart the popular will, and to generate labor strife in higher education in that State.⁸⁰⁷ And it illustrates the great danger of permitting *fascism without safeguards* to flourish in this country.⁸⁰⁸

In sum, the foregoing findings, while descriptive in some instances, either prove next to nothing about MEA's political involvement, or are not true.

The NEA is a national teacher organization which engages in a variety of activities aimed at promoting public education, teacher welfare and improving the bargaining ability and position of its members and affiliates.⁸⁰⁹

This finding is merely descriptive. To be sure, NEA "engages in a variety of activities". *What* these activities have been, specifically, and *to what degree* they have been "political" or "collective-bargaining" in nature, the Court does not say.

⁸⁰⁵ CFF at 10.

⁸⁰⁶ LAI at 16 & nn.63-64.

⁸⁰⁷ PFF Nos. 204-06, 208-19, 270.

⁸⁰⁸ *See post*, pp. 238-47.

⁸⁰⁹ CFF at 10.

*The overwhelming majority of NEA's budget expenditures relate to training teachers in grievance procedures, professional growth and skill development of teachers, technical management and other organizational assistance to its affiliates, extensive research support relating to collective bargaining issues, and direct assistance to affiliates engaged in collective bargaining.*⁸¹⁰

This finding is without any credible support in the record. NEA's "budget expenditures" appeared in NEA's financial documents. But, as Plaintiffs' expert-witness in accounting and the UTP's own witness agreed, these documents were incapable of identifying, segregating, or quantifying [203] NEA's involvement in "politics" or "collective bargaining".⁸¹¹ *And no other purported evidence relating to NEA's "budget expenditures" entered "the record as a whole".* In addition, the Court again refers to the erroneous—indeed, operationally meaningless—standard of "relating to collective bargaining issues". If this standard is an incompetent measure of MEA's political involvement, it is no better as applied to NEA. Here, though, the Court also generates a new category composed of "direct assistance to affiliates engaged in collective bargaining". Obviously, however, this does not mean "direct assistance to affiliates in collective bargaining" itself, at least in the Minnesota community colleges. For the UTP has already stipulated that NEA's assistance to MCCFA "directly in collective bargaining" has been, for all practical purposes, nil.⁸¹² Perhaps it simply means *any kind* of assistance to those affiliates, who happen in *other* ways themselves to be engaged in "collective bargaining". If so, the assistance itself is not "a collective-bargaining" activity, any more than a

⁸¹⁰ *Id.*

⁸¹¹ PFF Nos. 145-51.

⁸¹² PRS No. 49.

contribution of money to the Democratic or Republican Party to be used for a candidate's electoral campaign would be "collective-bargaining" in nature simply because the Party was engaged in "bargaining" somewhere else. And, in any event, even if all of NEA's assistance to affiliates *other than MCCFA* were "collective-bargaining" in nature, with respect to Plaintiffs it would still be "political" for First-Amendment purposes.⁸¹³ The Court's finding, in short, [204] lacks any support in the evidence, rests on a faulty legal standard, and is beside the point.

In sum, the foregoing findings, while descriptive in some instances, either prove next to nothing about NEA's political involvement, or are not true.

NEA-PAC AND IMPACE ARE POLITICAL ACTION ARMS OF NEA AND MEA, RESPECTIVELY. NEA-PAC MAKES CONTRIBUTIONS TO THE CAMPAIGNS OF FEDERAL CANDIDATES, AND IMPACE MAKES CONTRIBUTIONS TO STATE *and local* CANDIDATES. THE FUNDS FOR SUCH CONTRIBUTIONS ARE INDEPENDENT OF DUES-MONEY, AND ARE RAISED THROUGH SEPARATE VOLUNTARY CONTRIBUTIONS, PRIMARILY FROM TEACHERS.⁸¹⁴

As explained heretofore, this finding provides yet another statement of the integral nature of NEA-PAC, IMPACE, NEA, and MEA.⁸¹⁵ It also provides another example of this Court's "carefu[l] revie[w]" of record—in as much as IMPACE does *not* make contributions to *local* candidates, but does make contributions to *federal* candidates in Minnesota.⁸¹⁶

⁸¹³ See *ante*, pp. 58-64.

⁸¹⁴ CFF at 10.

⁸¹⁵ See *ante*, pp. 181-83, 185-88.

⁸¹⁶ PFF Nos. 47, 66 & 11.89.

THERE IS SOME OVERLAP OF NEA-PAC ACTIVITY WITH REGULAR NEA ORGANIZATIONAL ACTIVITY AND STAFF, AND SOME NEA POLITICAL ACTIVITY THAT MAY BE ONLY INCIDENTALLY RELATED TO COLLECTIVE BARGAINING. *The NEA has a rebate procedure which refunds, to each member who desires, the portion of regular dues expended on political activity which does not bear directly on collective bargaining, grievance procedures and teacher welfare. Rebated costs include those related to any overlap with NEA-PAC, the preparation or dissemination of candidate ratings or any other indication of candidate preference, certain ideological or charitable activity, and other lobbying not related directly to collective bargaining or terms and conditions of employment. The rebatable amounts, as determined by NEA, have always aggregated to less than [205] 10% of NEA dues. There was no evidence introduced showing that NEA expended more than the rebatable amounts on political activity related to collective bargaining matters.*⁸¹⁷

This purported finding is composed wholly of misrepresentation and gross error. "[S]ome overlap of NEA-PAC activity with regular NEA organizational activity and staff", the Court says, implying that it is minimal and unimportant. *Some?! Why, in fact, the Chairman of NEA's Steering Committee is NEA's President; and, in his absence, NEA's Vice President performs that function.*⁸¹⁸ In addition to them, NEA's Treasurer⁸¹⁹ and two representatives of NEA's Board of Directors⁸²⁰ sit on the Committee,

⁸¹⁷ CFF at 10-11.

⁸¹⁸ PRS No. 584.

⁸¹⁹ *Id.* No 582.

⁸²⁰ *Id.* No. 581.

with NEA's Executive Director, General Counsel, and Director of Government Relations serving as consultants.⁸²¹ Moreover, revisions of NEA-PAC's guidelines require approval of NEA's Board of Directors;⁸²² and NEA-PAC's budget may not become final without approval by NEA's Executive Committee.⁸²³ If NEA's Executive Committee can *veto* NEA-PAC's whole budget, any fair-minded person would say that the "overlap" between NEA-PAC and NEA is much more than merely "some". Then, the Court refers to "some NEA political activity * * * only incidentally related to collective bargaining", once more implying [206] the unimportance of that activity. *Some*?! What the record showed is that there may have been *some* NEA political activity "related to collective bargaining"—although *not* in the community colleges.⁸²⁴ However, NEA did not even attempt to quantify its involvement in such activity.

What NEA did do, as the Court points out, was: (i) to admit that it engaged in "political" activity "unrelated to collective bargaining" *according to its own arbitrary definitions of those terms*; (ii) to attempt to introduce into evidence a phoney "rebate procedure" allegedly quantifying the level of its political involvement *without introducing the documents underlying the calculation, or calling as witnesses the people who supposedly did it*; (iii) to claim that all its other "political" activities were "related to collective bargaining" *without identifying or quantifying those activities, or explaining how they satisfied the strictures of Abood*; and (iv) to anticipate that this Court would adopt the UTP's theory of the case, *without any basis in law for doing so*. Thus, the Court accepts the "rebate" calculation, even though it was inadmissible as against Plain-

⁸²¹ *Id.* No. 583.

⁸²² *Id.* No. 574.

⁸²³ *Id.* No. 588

⁸²⁴ *Id.* No. 49

tiffs, not based upon sound principles of cost accounting, concededly inaccurate, and, overall, not a good-faith attempt to calculate NEA's "political" expenditures.⁸²⁵ Moreover, the Court unlawfully shifts the burden of proof from the UTP⁸²⁶ to Plaintiffs by presuming that whatever "rebate" figure NEA generated is correct, no matter how obviously [207] fraudulent the "rebate procedure" itself, until Plaintiffs disprove that figure, not simply the honesty or workability of the "procedure" itself. Plaintiffs, however, had and could have had no burden to quantify the level of NEA's political involvement. They established a *prima facie* case by showing, qualitatively, that NEA (and the UTP as a whole) was substantially and essentially involved in political activism of every major type.⁸²⁷ The burden of going forward then shifted to the UTP to carry its burden of persuasion on the issue. The UTP attempted to fulfill this task, at the national level only,⁸²⁸ with NEA's "rebate procedure". Plaintiffs, however, demonstrated without contradiction that this procedure was fatally defective, if not patently dishonest. Therefore, their *prima facie* case became conclusive, without any need to show what a proper "rebate" calculation should have been. In any event, the Court's comment that "[t]here was no evidence introduced showing that NEA expended more than the rebatable amounts on political activity unrelated to collective bargaining matters", besides resurrecting once again the faulty standard "relating to collective bargaining matters (or issues)", simply overlooks such proof as the gross inconsistency between Plaintiffs' content-analysis of NEA's

⁸²⁵ PFF Nos. 155-60. See *ante*, pp. 125-31. See also *School Comm. v. Greenfield Educ. Ass'n*, 109 L.R.R.M. 2420, 2424 n.4 (Mass. 1982).

⁸²⁶ CFF at 2 & n.1.

⁸²⁷ PFF Nos. 57-140.

⁸²⁸ PFF No. 154.

newspaper and the amount NEA said should be “rebated” on account of “political” articles in that newspaper.⁸²⁹

SEPARATE FROM NEA-PAC AND REBAT-
 ABLE ACTIVITY, NEA DOES ENGAGE IN PO-
 LITICAL ACTIVITY AT THE FEDERAL LEVEL
*that the [208] record shows relates directly to collective
 bargaining, education funding and other issues that
 are integral to teacher welfare.*⁸³⁰

Where did the record show that any of NEA’s political activity, at the federal level or elsewhere, “relates directly to collective bargaining” in the sense permissible under *Abood*? Nowhere. Indeed, the UTP has stipulated that essentially *none* of NEA’s activities, of *any* sort, “relate to collective bargaining” in the community colleges.⁸³¹ Furthermore, assuming *arguendo* that the record did evidence some relation between NEA’s political activities and “collective bargaining, education funding and other issues that are integral to teacher welfare”—so what? Political activity relating to “education funding and other issues that are integral to teacher welfare” is not privileged under *Abood*, even for MCCFA, which does “meet and negotiate” in the community colleges. All this finding says, then, is that *separate from NEA-PAC and “rebatable” activity*, NEA engages in political activity within *Abood* (“related to collective bargaining”) in relation to individuals other than Plaintiffs, *and* in political activity outside *Abood* in relation to all individuals. Or, this Court finds that NEA’s “rebate procedure” did not establish the total amount of political involvement of the UTP’s national-level unit. Which simply

⁸²⁹ PFF No. 157(vi) (c). *See also* Plaintiffs’ Motion to the Special Master to Re-Open the Trial Record, and for Sanctions Against the United Teaching Profession Defendants (3 February 1981), at 24.

⁸³⁰ CFF at 11.

⁸³¹ PRS. No. 49.

confirms what Plaintiffs have said all along. Then, says the Court, "rebatable" political activity amounted to no more than 10% of NEA's budget. But this other political activity, "separate from . . . rebatable activity", the Court does not quantify. Therefore, [209] consistently with the Court's finding, it could amount to a predominant part of NEA's budget—just as Plaintiffs' expert-witness in political science inferred.⁸³²

THERE IS SOME OVERLAP BETWEEN IMPACE ACTIVITY AND THE REGULAR MEA ORGANIZATION ACTIVITY AND STAFF. FOR EXAMPLE, LOCAL GOVERNMENT RELATIONS COUNCILS PARTICIPATE IN SCREENING LOCAL CANDIDATES, AS DOES IMPACE. IN ADDITION, SOME MEA STAFF MEMBERS PARTICIPATED IN POLITICAL ACTIVITY ON BEHALF OF THE 1976 CARTER-MONDALE CAMPAIGN, *but the evidence showed that such partisan activities, taken as a whole, would be less than 2% of MEA's total budgeted activities.*⁸³³

"[S]ome" overlap?! As shown on the organizational diagrams that summarized the testimony of the UTP's own witnesses, IMPACE has been entirely dependent on MEA for the "screening" (interviewing) of candidates, and for the collection of contributions for candidates' campaigns.⁸³⁴ The Court is correct in saying that some local governmental relations councils have "screened" local candidates. But it implicitly misrepresents the situation by suggesting that those councils have not participated in IMPACE's "screening", too. In fact, *all* of IMPACE's "screening", for state

⁸³² PFF No. 117.

⁸³³ CFF at 11.

⁸³⁴ PTE Nos. 28, 42, 47, 63, 72, 96, 119. See PFF Nos. 65 & n.86, 66.

and federal candidates alike, has operated through MEA's governmental-relations-council network at the state and local levels as any but a blind person can see.⁸³⁵ The Court is also correct in saying that MEA staff-personnel participated in political activity in the 1976 presidential elections—although it should have added that *at least one of those persons lied about his involvement under oath in deposition-[210] testimony in this case.*⁸³⁶ In any event, where in the record is there any evidence showing that MEA budgeted less than 2% for such political activities? MEA's budgets could not even identify, let alone quantify, its political activities, as its own witness admitted and Plaintiffs' expert-witness in accounting testified without contradiction.⁸³⁷ And how is this or any other figure material where "screening" of candidates, and the collection of monies destined for candidates' campaigns, have been primarily the work of *unpaid* rank-and-file members of MEA? Is not the important indicium the numerous admissions by MEA of its substantial involvement in partisan politics, including such statements by MEA's Executive Director as that "MEA is a powerful political force", and that "political parties are turning to [MEA] for advice and help"?⁸³⁸

SEPARATE FROM ANY IMPACE OVERLAP,
MEA REGULARLY ENGAGES IN POLITICAL
ACTIVITY AT THE STATE AND LOCAL LEVELS
IN THE AREAS OF EDUCATION FUNDING,
TEACHER TENURE RIGHTS, CLASS-SIZE POL-
ICY, RETIREMENT BENEFITS AND OTHER
TEACHER WELFARE CONCERNS AFFECTED
BY STATE OR LOCAL BUDGET DECISIONS.

⁸³⁵ PTE Nos. 49, 72. See PFF No. 65 & n.85.

⁸³⁶ See Petitioners' Appendices, *In re Knight*, No. 79-1910 (8th Cir., filed 24 October 1979), at 219-22.

⁸³⁷ PFF Nos. 145-50, 152, 154.

⁸³⁸ *Id.* No. 124 & nn.201, 204.

THROUGH ITS GOVERNMENT RELATIONS COMMITTEE AND DEPARTMENT AND THROUGH A COORDINATED PROGRAM OF LOCAL VOLUNTEER MEMBERS, MEA ORGANIZES LOBBYING EFFORTS DIRECTLY RELATED TO THE FOREGOING TEACHER CONCERNS. *The record establishes that such political activities relate closely and directly to the collective bargaining efforts of MEA.*⁸³⁹

Most of this finding is factually correct, except for the Court's failure to review the record carefully enough to learn that MEA has traditionally lobbied at the national, as well as [211] the state and local, levels.⁸⁴⁰ The finding rests on a blatant error of law, however, in its conclusion that lobbying for things other than legislative ratification or implementation of a collective-bargaining agreement itself is "related to collective bargaining" under *Abood*. Such lobbying is *not* so related, because it is not "an integral part of the bargaining process".⁸⁴¹ Therefore, what this Court actually finds is that MEA has been deeply involved in lobbying, pure and simple—all of which lobbying is "political" activity with respect to Plaintiffs. Because this lobbying has been, by the Court's own description, "[s]eparate from any IMPACE overlap", the Court thus finds that *more than 2%* of MEA's budgetary expenditures have been "political" in nature—although, how much more the Court cannot determine. Why it is not a significant amount, as MEA itself has admitted again and again,⁸⁴² the Court does not say. What the Court does state is a further ground—if one were really needed—for finding MEA integrated with its local-level affiliates: namely, the "coordinated [lobby-

⁸³⁹ CFF at 11.

⁸⁴⁰ PFF No. 79; PTE No. 70.

⁸⁴¹ See *ante*, pp. 58-64, 200-01.

⁸⁴² PFF No. 126 & n.211.

ing] program of local volunteer members" that "MEA organizes".

*MCCFA has engaged in political activity that the record shows relates chiefly to securing legislative approval of the employment contracts negotiated or arbitrated with the MSBCC and to other collective bargaining issues.*⁸⁴³

The record shows no such thing. First, every witness who testified on the subject agreed that the financial documents [212] of MCCFA that the UTP attempted to introduce into evidence did not and could not identify, segregate, and quantify MCCFA's activities into the categories "politics" and "collective bargaining".⁸⁴⁴ Second, no witness for MCCFA was able to provide satisfactory evidence of how he spent his working-time on behalf of that UTP sub-unit.⁸⁴⁵ And third, Plaintiffs' content-analyses of the minutes of MCCFA's Board of Directors and of its newsletter showed that much of its political activity had nothing to do with "securing legislative approval of the employment contracts".⁸⁴⁶ In any event, the Court does not contend in this finding that *most*, or even much, of MCCFA's political activity related to "securing [this] legislative approval". Rather, the Court says that MCCFA's lobbying "relates chiefly" to that *and* to "other collective bargaining issues", in some *undefined* proportion. Political activity that "relates to collective bargaining issues" only, however, is not privileged under *Abood*. So, in effect, the Court finds that MCCFA has been involved in lobbying, some of which "related to collective bargaining" because it involved "securing legislative approval of the employment contracts", *but*

⁸⁴³ CFF at 11.

⁸⁴⁴ PFF Nos. 145-50, 153-54.

⁸⁴⁵ *Id.* No. 162(iv-v)

⁸⁴⁶ *Id.* No. 138 & nn.237-38; PTE Nos. 124, 128.

the rest of which did not properly relate to "collective bargaining". And the Court cannot tell in how much of each type of lobbying MCCFA engaged. Or, if MCCFA had the burden of proving the extent of its political activity "related" or "unrelated to collective bargaining";⁸⁴⁷ and if this finding is the most [213] the Court can say in MCCFA's behalf on the subject—then, obviously, MCCFA did not carry its burden of proof.

Taken as a whole, the record establishes that MEA and NEA are properly characterized as public employee organizations actively engaged in improving through collective bargaining the terms and conditions of employment for teachers, and that MCCFA is organized and affiliated with MEA and NEA to pursue similar efforts on behalf of the community college faculty it represents. ALL THREE ORGANIZATIONS ENGAGE IN A WIDE RANGE OF LEGISLATIVE, GOVERNMENTAL AND PUBLIC RELATIONS ACTIVITIES that are closely and directly related to furtherance of each organization's collective bargaining activities. IMPACE and NEA-PAC are separate from the regular operations of MCCFA, MEA and NEA and engage in partisan political activity financed by the independent, voluntary contributions of individual teachers and others.⁸⁴⁸

The Court's characterization of MEA and NEA as "public employee organizations" is pedestrian and irrelevant. Their members being, for the most part, public employees, of course MEA and NEA are "public employee organizations". The question, however, is whether they are *also predominantly political organizations*. Revealingly, the Court never denies that they are such. Rather, it merely claims

⁸⁴⁷ CFF at 2 & n.1.

⁸⁴⁸ *Id.* at 12.

that their "wide range of [political] activities * * * are closely and directly related to * * * collective bargaining activities"—or, that MEA and NEA, *even though they are political-action organizations*, still have a defense to Plaintiffs' charges. But Plaintiffs have already shown that this "defense" is purely fictional, MEA and NEA being unable to demonstrate that their political activities properly "relate to collective bargaining" under *Abood*. So, in effect, the Court defines them to be what [214] Plaintiffs have said all along they are: predominantly political organizations. Period. The Court leaves MCCFA in an even more precarious position, by admitting that it engages in a "wide range of [political] activities", but failing to characterize it as a "public employee organization". Actually, because MCCFA has "me[t] and negotiate[d]" in the community colleges, as opposed to MEA and NEA which have never done so,⁸⁴⁹ under PELRA MCCFA is an "employee organization", an "organization of public employees whose purpose is, in whole or in part, to deal with public employers concerning grievances and terms and conditions of employment".⁸⁵⁰ It is also a predominantly political organization, though, in its own right and because of its integration in the UTP. The Court's further comment that "IMPACE and NEA-PAC are separate from the regular operations of MCCFA, MEA and NEA" is pure fantasy, as anyone can see by inspecting organizational diagrams of how IMPACE and NEA-PAC have operated *through*, not "separate from", MCCFA, MEA, and NEA.⁸⁵¹ Indeed, even the Court admits as much in its earlier findings, where it says that "[t]here is some overlap between IMPACE activity and the regular MEA organizational activity and staff",⁸⁵² and "[t]here is

⁸⁴⁹ PRS Nos. 49-50.

⁸⁵⁰ Minn. Stat. § 179.63, subd. 5 (emphasis supplied).

⁸⁵¹ PTE Nos. 5, 28, 49, 63, 72, 96, 119.

⁸⁵² CFF at 11.

some overlap of NEA-PAC activity with regular NEA organizational activity and staff".⁸⁵³

[215] *This finding is based on the testimony of numerous officers and staff of MCCFA, MEA and NEA concerning the character of their political activity and the proportion of their time spent on political activity of any kind, in addition to the many exhibits relating to budget allocations of each organization.*⁸⁵⁴

Plaintiffs have already described in detail why neither this "testimony" nor these "exhibits" provides clear and convincing evidence—or, for that matter, "substantial evidence" or even any evidence—of the UTP's allegedly non-political character.⁸⁵⁵ Suffice it to say that the "testimony" is worthless because: (i) much of it purported to contradict the parties' stipulations;⁸⁵⁶ (ii) Plaintiffs demonstrated numerous instances of patently false statements by several witnesses;⁸⁵⁷ (iii) the testimony lacked support in documentary evidence although such evidence was supposedly in existence and accessible to the UTP;⁸⁵⁸ (iv) the UTP's own documents in the record contradicted much of the testimony;⁸⁵⁹ (v) almost all of the [216] testimony rested on retrospective "guesses" and "estimates", rather than on

⁸⁵³ *Id.* at 10.

⁸⁵⁴ *Id.* at 12.

⁸⁵⁵ *Ante*, pp. 108-67.

⁸⁵⁶ PFF No. 164.

⁸⁵⁷ *Id.* at 86 n.310, 87 n.311, 90 n.331, 94 n.344; Plaintiffs' Motion to the Social Master to Re-Open the Trial Record, and for Sanctions Against the United Teaching Profession Defendants (3 February 1981), at 7-23.

⁸⁵⁸ PFF No. 161 & n.303, 162(ii, ix-xi, xiii, xvii).

⁸⁵⁹ *Id.* No. 161 & n.304.

demonstrable, objective facts;⁸⁸⁰ and (vi) Plaintiffs' expert-witness in political science testified without contradiction that testimony resting on retrospective guesses is unreliable for the purpose for which the UTP adduced it.⁸⁸¹ Similarly, the "evidence" to which the Court refers is worthless because: (i) for the most part, it was inadmissible and objected to as such;⁸⁸² and (ii) whether admissible or not, it was incapable of identifying, segregating, and quantifying the UTP's activities, at any level, into "politics" and "collective bargaining".⁸⁸³

THERE WERE TWO TYPES OF AFFIRMATIVE EVIDENCE PRESENTED BY THE PLAINTIFFS TO SHOW THAT THE DEFENDANT ORGANIZATIONS ARE PREDOMINANTLY POLITICAL ORGANIZATIONS: (1) WRITTEN OR ORAL STATEMENTS MADE BY THE DEFENDANT ORGANIZATIONS TO THE EFFECT THAT POLITICAL ACTION IS AN INTEGRAL, ESSENTIAL ELEMENT OF THEIR ACTIVITIES: AND (2) A "CONTENT ANALYSIS" OF SELECTED PUBLICATIONS AND MEETING MINUTES OF VARIOUS DEFENDANT ORGANIZATIONS, FROM WHICH IT WAS INFERRED THAT 50-100% OF EACH ORGANIZATION'S ACTIVITY IS "POLITICAL" AS OPPOSED TO "COLLECTIVE BARGAINING".

We find this affirmative evidence unpersuasive. It fails to distinguish between political activity related to collective bargaining and political activity unrelated to that end. The content analysis in particular treats all "lobbying, organizing and litigation" matters as separate from "collective bargaining." Lobbying, organiz-

⁸⁸⁰ *Ante*, pp. 151-67.

⁸⁸¹ T. at 3728 (cross-examination), *quoted in* PFF at 84 n.303.

⁸⁸² PFF Nos. 168-72.

⁸⁸³ *Id.* Nos. 145-60.

*ing and litigation activities that directly relate to collective bargaining issues are thus excluded from the "collective bargaining" category of the analysis. The content analysis also assumes that the publications analyzed accurately reflect the range of activities actually undertaken by the organizations, an assumption unsupported by the record as a whole. The [217] analysis of organizational publications was also outweighed by the firsthand testimony of the officers and staff of such organizations and the budgetary and other records of their activity.*⁸⁸⁴

This conclusory "finding" represents the nadir of the Court's performance in this case, thoroughly misrepresenting the record in an apparent attempt to reach a pre-determined conclusion in the absence of any supporting evidence. First, the Court refers to "two types of affirmative evidence presented by the plaintiffs"—refraining from any mention of the unchallenged testimony of Plaintiffs' expert-witness in political science, who characterized the record in this case as "more complete than [he had] ever seen before on any pressure group",⁸⁸⁵ and concluded that the UTP is a predominantly political organization.⁸⁸⁶ Second, although the Court concedes that Plaintiffs presented "written and oral statements made by the [UTP] to the effect that political action is an integral, essential element of their activities", it claims that "this affirmative evidence [is] unpersuasive", because Plaintiffs supposedly did not distinguish between political activity "related to collective bargaining" and political activity "unrelated" thereto. What the Court conveniently forgets, however, is that the UTP admitted, again and again, its essential and substantial involvement

⁸⁸⁴ CFF at 12-13.

⁸⁸⁵ PFF No. 111.

⁸⁸⁶ *Id.* No. 116. *See ante*, pp. 52-53, 83-85.

in *partisan politics*.⁸⁶⁷ As a matter of law, partisan politics is not and cannot be "related to collective bargaining" under *Abood*.⁸⁶⁸ [218] Therefore, even if Plaintiffs' "affirmative evidence" had stopped with that showing alone, it would have sufficed for the conclusion that the UTP is a predominantly political organization. For an organization is a political-action, or predominantly political organization if it engages to an essential or substantial degree in *any* form of political activism, be it partisan politics, or lobbying, or propaganda and agitation, or political litigation, or political organizing.⁸⁶⁹ Third, the Court faults Plaintiffs' content-analyses for supposedly not distinguishing between politics "related" and "unrelated to collective bargaining issues". Again, the Court uses the wrong legal standard: To be "related to collective bargaining", political activity must be "an integral part of the bargaining process", not simply concerned with some subject-matter that may also be addressed in negotiations.⁸⁷⁰ In any event, how does the Court know that the analyses are, in fact, faulty? It was the UTP's burden to demonstrate this, if it could. But the UTP produced no counter-analysis.⁸⁷¹ It adduced no counter-testimony.⁸⁷² It made no counter-showing that, in any specific instance, the methodology or conclusions of Plaintiffs' con-

⁸⁶⁷ PFF Nos. 122-24.

⁸⁶⁸ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-36 (1977) (opinion of Stewart, J.).

⁸⁶⁹ See Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 323-49 (1978).

⁸⁷⁰ *Ante*, pp 58-64.

⁸⁷¹ See PFF at 42 n.154, 59 n.226.

⁸⁷² The only person other than the preparer of the analyses to testify concerning them was Plaintiffs' expert-witness in political science, who described the results as "sound". *Id.* No. 140.

tent-analyses were improper or inaccurate.⁸⁷³ Rather, the UTP's counsel simply asked whether the analyses purported to make the phoney distinction between politics "related to collective bargaining issues" and politics not so "related", was told [219] (correctly) that they did not, and proceeded to argue that, therefore, the analyses were unreliable—even though the legal standard "related to collective bargaining issues" is erroneous, and no proof entered the record to indicate that the analyses would change significantly were that erroneous standard applied. In effect, then, the Court says that Plaintiffs' content-analyses are not probative because they did not pre-emptively disprove the irrelevant contention that the UTP had the burden to prove, if proof were possible, but never even attempted to prove! Or, once again, the Court adopts the rule that the double-talk of the UTP's counsel is better evidence than a record "more complete than [one of this country's leading political scientists had] ever seen before on any pressure group". Of course, the Court also says that Plaintiffs' content-analyses of the UTP's publications assumed "the publications * * * accurately reflect the range of activities actually undertaken by the organizations". Indeed, they did so assume—but properly so, on the basis of the UTP's own stipulations,⁸⁷⁴ and the testimony of its own witness at trial.⁸⁷⁵ In any event, the Court refrains at this juncture from mentioning Plaintiffs' content-analyses of the *minutes of the UTP's governing-bodies*. Does the Court contend that these minutes did not "accurately reflect the range of activities actually undertaken by the organizations"? Does it contend that these minutes were not highly probative evidence of what the units have done,⁸⁷⁶ and were

⁸⁷³ *Id.* No. 135.

⁸⁷⁴ PRS Nos. 333-45, 376-78, 395-401.

⁸⁷⁵ PFF at 41 n.149.

⁸⁷⁶ See *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 423-24 (1820).

not presumptively correct?⁸⁷⁷ Of course not. [220] But, *content-analyses of the minutes are identical, for all practical purposes, with content-analyses of the publications!*⁸⁷⁸ So, the Court's objection to the assumption underlying the analyses of the publications collapses. Which leaves only the claim that "[t]he analysis of organizational publications was * * * outweighed by the firsthand testimony of the officers and staff of such organizations and the budgetary and other records of their activity". But, as Plaintiffs just explained, "other records" of the units' activities—indeed, presumptively the *best* records, the minutes of the governing-bodies—agreed perfectly with the content-analyses of the UTP's publications. Moreover, the UTP's "budgetary" records were incapable of distinguishing between the units' "political" and "collective-bargaining" activities, let alone of further dividing the former into "political activity 'related to collective bargaining' " and "political activity 'unrelated to collective bargaining' ".⁸⁷⁹ And the "firsthand testimony" was generally worthless in its own right,⁸⁸⁰ and could hardly suffice to contradict the very minutes of the UTP's governing-bodies,⁸⁸¹ without some showing that the minutes were false.⁸⁸² In short, this Court's "finding" implicitly adopts the amazing proposition that, even though

⁸⁷⁷ See *Caldwell v. Commissioner*, 135 F.2d 488, 490 (5th Cir. 1943).

⁸⁷⁸ See PFF No. 117 & n.182.

⁸⁷⁹ *Id.* Nos. 145-60.

⁸⁸⁰ *Id.* Nos. 161-66. See *ante*, pp. 131-67.

⁸⁸¹ *E.g.*, *United States v. United States Gypsum Co.*, 333 U.S. 356, 394-96 (1948); *United States v. IBM Corp.*, 66 F.R.D. 154, 158-60 (S.D.N.Y. 1974); *Toledo Scale Corp. v. Westinghouse Elec. Corp.*, 351 F.2d 173, 179 (6th Cir. 1965); *Schnaier v. Farr*, 99 F.2d 968, 972 (Ct. Cust. & Pat. App. 1938).

⁸⁸² See, *e.g.*, *Thomas v. Commissioner*, 232 F.2d 520, 526 (1st Cir. 1956).

the UTP had the burden of proof by clear and convincing evidence, *no proof* from the UTP can overcome unchallenged expert-testimony of one of the country's [221] leading political scientists based on a record "more complete than [he had] ever seen before on any pressure group", can negative unchallenged content-analyses of the UTP's own minutes and publications, and can obviate the UTP's own, redundant admissions of its essential and substantial involvement in partisan politics *inter alia*.

In sum, the foregoing findings do not establish that the UTP is a predominantly non-political organization. Rather, properly analyzed, they show that the UTP presented *no case whatsoever* on its allegedly non-political character, and that even the Court recognizes the abundance of evidence in the record supporting Plaintiffs' contention. To be sure, the Court simply whitewashes the evidence in the UTP's favor. One cannot, however, make a silk purse from a sow's ear, or a "collective-bargaining" organization from the UTP, which proudly calls itself a "special-interest group", "pressure group", "lobbying group", "movement", "faction", and even "the education party"⁸⁸³—but *never* describes itself as strictly, predominantly, or even principally a "collective-bargaining" outfit.

C. This Court's findings do not support its conclusion that "exclusive representation" does not infringe Plaintiffs' freedoms of association, speech, and belief.

In §§ IV.A. and IV.B. of its findings,⁸⁸⁴ this Court makes several statements that imply the absence of any infringement of Plaintiffs' freedoms of association, speech, and belief by "exclusive representation" as applied in the community colleges under PELRA. Plaintiffs have already ex-

⁸⁸³ PFF No. 121.

⁸⁸⁴ CFF at 17-18.

plained that “exclusive [222] representation” inherently and inescapably infringes on First-Amendment freedoms of dissenting employees, as the Supreme Court has already held.⁸⁸⁵ Analysis of the Court’s purported findings on this matter, though, would nevertheless be profitable.

The decision to join or contribute to IMPACE or NEA-PAC is wholly an individual, voluntary one. *This record is devoid of any evidence that the plaintiffs have been required or in any manner coerced into supporting, joining, or refraining from opposing the efforts of IMPACE or NEA-PAC.*⁸⁸⁶

Nonsense. The record established with pictorial clarity that “the efforts of IMPACE and NEA-PAC” have always directed themselves through pervasive contact-networks involving MEA, throughout the State of Minnesota, and MCCFA, in the community colleges.⁸⁸⁷ It also established that MCCFA’s position as “exclusive representative” in the colleges enhances its ability to engage in such political activism on behalf of IMPACE, NEA-PAC, or otherwise.⁸⁸⁸ No one disputes that, as a condition of employment in the colleges, Plaintiffs must accept MCCFA as their “exclusive representative”, accede to the terms and conditions of employment it negotiates, and acquiesce in whatever enhancement of its ability to participate in political activism “exclusive representation” provides.⁸⁸⁹ But, if PELRA compels Plaintiffs to accept MCCFA as their “exclusive representative”; if “exclusive representation” necessarily associates Plaintiffs with MCCFA

⁸⁸⁵ *Ante*, pp. 10-12.

⁸⁸⁶ CFF at 17.

⁸⁸⁷ PTE Nos. 28, 49, 59, 63, 96, 119. *See* PFF Nos. 64-66.

⁸⁸⁸ PFF No. 174.

⁸⁸⁹ *Id.* Nos. 258-60, 263.

against their will; if MCCFA is integrated with MEA, NEA, IMPACE, and NEA-PAC in the UTP; and if MCCFA cooperates with MEA, NEA, IMPACE, and NEA-PAC [223] in the "efforts of IMPACE and NEA-PAC"—then, Plaintiffs have been "coerced into supporting * * * or refraining from opposing the efforts of IMPACE and NEA-PAC" as a condition of retaining their faculty-positions in the community colleges.

*The only statutorily-imposed relationship between plaintiffs and MCCFA, MEA and NEA involves the deduction of a fair share fee from the plaintiffs that is paid to MCCFA as the exclusive bargaining representative of community college faculty, a portion of which is paid to MEA and NEA for various collective bargaining and related assistance the latter groups provide to MCCFA.*⁸⁹⁰

PELRA does not require MCCFA to collect a "fair-share" fee from Plaintiffs.⁸⁹¹ Neither does it require MCCFA, if it collects such a fee, to pay any of it to MEA or NEA. So, if PELRA *imposes* on Plaintiffs a relationship with MEA and NEA because of their payment of "fair-share" fees to MCCFA, it must be because: (i) payment of money by Plaintiffs to MCCFA involves forced association; and (ii) payment of that money by MCCFA to MEA and NEA extends the forced association to those two UTP units as well. But, by a parity of reasoning, PELRA imposes an associational relationship on Plaintiffs simply by requiring them to accept MCCFA as their "exclusive representative". For only by being "exclusive representative" can MCCFA charge "fair-share" fees to Plaintiffs. Therefore, what the Court is really saying is

⁸⁹⁰ CFF at 17.

⁸⁹¹ See Minn. Stat. § 179.65, subd. 2.

that, as applied in the community colleges, "exclusive representation" imposes an associational relationship among Plaintiffs, MCCFA, and MEA and NEA. The same result obtains, of course, because of the integration of MCCFA, MEA, and NEA in the UTP.

To obtain or retain their faculty positions, or to derive the economic, job security and other benefits under the [224] "terms and conditions" (as defined by PELRA) of their employment, the plaintiffs have not been and are not required or coerced into joining, or refraining from opposing MCCFA, MEA, or NEA. Such rights and benefits flow equally to all faculty members regardless of their membership or nonmembership in MCCFA.

What, pray tell, has "membership or nonmembership in MCCFA" to do with the issues in this case? PELRA requires Plaintiffs, as a condition of employment in the colleges, to accept MCCFA as their "exclusive representative" and to work under the terms and conditions of employment that MCCFA negotiates, without opposing those terms and conditions. This is the essence of "exclusive representation". Because MCCFA is integrated with MEA and NEA (as well as with IMPACE and NEA-PAC), "exclusive representation" as applied here coerces Plaintiffs into "refraining from opposing" MEA, NEA, IMPACE, and NEA-PAC, too—at least in so far as the latter gain any tangible organizational benefits from MCCFA's status as "exclusive representative". That Plaintiffs may receive all the "rights and benefits" of the negotiated agreements is irrelevant. Plaintiffs do not claim they have suffered discriminatory treatment in the allocation of employment benefits. They claim the Constitution privileges them to reject MCCFA as their "exclusive representative", no matter what unproven benefits they may receive as faculty-members.

*The plaintiffs have failed to demonstrate any direct, indirect, actual or potential impairment of their associational and free speech rights • • •*⁸⁹²

Here the Court simply denies that "exclusive representation" involves an associational relationship between the "representative", on the one hand, and the employees putatively "represented", on the other. The very name of the system, "exclusive *representation*", demonstrates the impossibility of [225] of this "finding": Can X possibly be said to "represent" Y, without X being *associated* with Y in some meaningful sense?! Perhaps the Court intends to imply that there is no *legal* relationship involved, within the meaning of the term "association" as used in First-Amendment jurisprudence. That, too, is a patently illogical statement.⁸⁹³ Similarly, does it not border on the incredible to claim, as does the Court, that "exclusive representation" has no effect on Plaintiffs' "free speech rights" when the whole purpose of the system is to preclude Plaintiffs from speaking to community-college officials concerning terms and conditions of employment, and to channel all such speech through the "representative"?⁸⁹⁴ No such purported "findings" as the Court provides can camouflage the facts about "exclusive representation" and the UTP.

In sum, the foregoing line-by-line analysis demonstrates that the Court's findings are false, misrepresent the record, are irrelevant, or support Plaintiffs' contentions, not those of the UTP. Findings so at odds with the record are sure to receive no acceptance and approbation in the Supreme Court.

⁸⁹² CFF at 18.

⁸⁹³ See *ante*, pp. 10-12.

⁸⁹⁴ Minn. Stat. § 179.66, subd. 7.

[226] IV. THIS COURT'S FINDINGS IMPROPERLY FAIL TO ADDRESS THE ISSUES OF THE NATURE AND EFFECTS OF "EXCLUSIVE REPRESENTATION" IN THE COMMUNITY COLLEGES.

Of all the manifest demerits in the Court's findings of fact, perhaps none is more shocking than the Court's failure or refusal even to address what is the central issue in this case: namely, the nature and effects of "exclusive representation" as applied in the community colleges under PELRA. From the very beginning of this litigation,⁸⁹⁵ before this Court prior to trial,⁸⁹⁶ before the Special Master on the eve of trial,⁸⁹⁷ and during the hearings themselves,⁸⁹⁸ Plaintiffs have emphasized repeatedly that "exclusive representation" is unconstitutional as applied because it empowers MCCFA, a self-interested private group, to make "economic laws" binding on Plaintiffs and others—in derogation of Plaintiffs' freedoms, and of governmental and popular sovereignty. Plaintiffs are not alone in recognizing that compulsory collective-bargaining laws, particularly in the public sector, provide "exclusive representatives" with such power.⁸⁹⁹ But, to date, the Supreme Court has had no opportunity to address [227] the issue in the

⁸⁹⁵ Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion to Convene a Statutory Three-Judge Court (13 February 1975), at 10-11.

⁸⁹⁶ Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss (14 March 1980), at 87-95.

⁸⁹⁷ Transcript of Pre-Trial Hearing of 29 July 1980 Before the Special Master at 84-89.

⁸⁹⁸ T. at 1277-85.

⁸⁹⁹ See *Aboud v. Detroit Bd. of Educ.*, 481 U.S. 209, 228-29 (opinion of Stewart, J.), 252-53 (Powell, J., concurring in the judgment) (1977); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198-203 (1944); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 366-67 (1974) (Marshall, J., dissenting).

specific area of "public-sector labor relations",⁹⁰⁰ or even in any pure "labor-relations" context.⁹⁰¹

In order to provide the Supreme Court with the record it must have to decide the fundamental question of the unconstitutionality of "exclusive representation" as applied under PELRA,⁹⁰² Plaintiffs and the Defendant State Officials adduced mutually consistent and reinforcing testimony from expert-witnesses in political economy,⁹⁰³ economics,⁹⁰⁴ labor and industrial relations,⁹⁰⁵ and political theory.⁹⁰⁶ The UTP presented no testimony from expert-

⁹⁰⁰ The issue did not arise in *Abood*. See, e.g., Brief for Appellants, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), at 126-27, 148, 149-50.

⁹⁰¹ See Vieira, "Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of 'Exclusive Representation' in Public-Sector Employment", 12 *Wake Forest L. Rev.* 515, 600-09, 616-20 (1976).

⁹⁰² See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236-37 (opinion of Stewart, J.), 244 n. (opinion of Stevens, J.) (1977); *Shaffer v. Heitner*, 433 U.S. 186, 220-22 (1977) (Brennan, J., concurring and dissenting); *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974); *Socialist Labor Party v. Gulligan*, 406 U.S. 583, 586-87 (1972); *Cowgill v. California*, 396 U.S. 371, 372 (1970) (Brennan & Harlan, JJ., concurring); *Rosenblatt v. Baer*, 383 U.S. 75, 100-01 (1966) (Fortas, J., dissenting); *Polk Co. v. Glover*, 305 U.S. 5, 10 (1938); *Borden's Farm Prods. Co., Inc. v. Baldwin*, 293 U.S. 194, 212 (1934).

⁹⁰³ Professor Melvyn Krauss, of New York University (Plaintiffs' witness).

⁹⁰⁴ Dr. Philip Bradley, consulting economist, Washington, D.C. (Plaintiffs' witness).

⁹⁰⁵ Professor Milton Derber, of the University of Illinois (Defendant State Officials' witness).

⁹⁰⁶ Mr. Sylvester Petro, Director of the Institute for Law and Policy Analysis, Winston-Salem, North Carolina (Plaintiffs' witness).

witnesses in these, or other relevant, disciplines. In essence, the expert-witnesses testified that:⁹⁰⁷ As applied in the community colleges, the "collective-bargaining" and "exclusive-representation" provisions of PELRA, the National Industrial Recovery [228] Act (NIRA),⁹⁰⁸ and the Bituminous Coal Conservation Act (BCCA)⁹⁰⁹ are mutually inter-related in three ways. Namely, "collective bargaining" and "exclusive representation" under PELRA (i) are the evolutionary developments of the systems of "collective bargaining" and exclusive representation that existed under NIRA⁹¹⁰ and BCCA;⁹¹¹ (ii) are functionally equivalent to the systems of "collective bargaining" and "exclusive representation" that existed under NIRA and BCCA, because they all are or were concerned with the same general activity or operation; and (iii) are structurally (or analytically) identical to the systems of "collective bargaining" and "exclusive representation" that existed under NIRA and BCCA, because they all exhibit the same basic structural elements, or conform to the same general analytical model.

Moreover, as applied in the colleges, "collective bargaining" through "exclusive representation" under PELRA (i) provides MCCFA (and, through it, the UTP) with a special procedure, not available to other interest-groups in society, through which to control or influence determination of terms and conditions of employment; (ii) delegates to

⁹⁰⁷ PFF Nos. 181-201, 208-19.

⁹⁰⁸ Act of 16 June 1933, ch. 90, 48 Stat. 195, *declared unconstitutional in A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁹⁰⁹ Act of 30 August 1935, ch. 824, 49 Stat. 991, *declared unconstitutional in Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

⁹¹⁰ § 7(a-c), 48 Stat. at 198-99.

⁹¹¹ § 4, Pt. III(a, g), 49 Stat. at 1001, 1002.

MCCFA (and, through it, to the UTP) a share in governmental decision-making [229] authority over terms and conditions of employment; (iii) effectively shifts some degree of decision-making power over terms and conditions of employment from the general public and their elected and appointed representatives to MCCFA and the UTP; and (iv) thereby is inconsistent with both governmental and popular sovereignty.

In its findings, the Court simply disregards the latter testimony. This it had no privilege to do.⁹¹² And its silence on the subject implies the Court's acceptance of the self-evidently *anti*-constitutional notion that the State of Minnesota has power to create a system of public-sector "labor relations" that, in political-economic principle and practice, goes beyond even the corporative-state arrangements of Italian fascism.

- A. Expert-witnesses for Plaintiffs and the Defendant State Officials agreed that "exclusive representation" under Minnesota's Public Employment Labor Relations Act, the National Industrial Recovery Act, and the Bituminous Coal Conservation Act are equivalent; and that "exclusive representation" in Minnesota delegates governmental and popular sovereignty to the "representative".**

There can be no rational dispute that all the expert-witnesses concurred on two basic points: first, that "exclusive representation" under PELRA, NIRA, and BCCA are equivalent; and, second, that "exclusive representation" under PELRA effectively delegates governmental and popular sovereignty to the "representative".

The witnesses established the interrelationship among NIRA, BCCA, and PELRA by reviewing the Supreme

⁹¹² See *ante*, pp. 36-44, 78-81.

Court's opinions [230] in *A.L.A. Schechter Poultry Corp. v. United States*⁹¹³ and *Carter v. Carter Coal Co.*,⁹¹⁴ and by analyzing the "collective-bargaining" and "exclusive-representation" provisions of the statutes themselves.⁹¹⁵ Professor Derber stated that NIRA "was the basis for * * * the arrangements that were developed under [BCCA]".⁹¹⁶ Asked whether there were any laws enacted after NIRA and BCCA "which embodied * * * these same principles, these same ideas", "that were of the same nature", Derber identified "all of these public sector [collective-bargaining] laws" such as PELRA, and added that he saw no significant difference between the "collective-bargaining" provisions of NIRA⁹¹⁷ and similar parts of subsequent "labor-relations" legislation.⁹¹⁸ Indeed, Derber explained that the concepts of "collective bargaining" and "exclusive representation" under PELRA can be traced historically to, and are essentially an evolutionary development of, those concepts as they existed under NIRA and BCCA.⁹¹⁹ Dr. Bradley concurred in this judgment.⁹²⁰

Professor Derber testified that "collective bargaining" under PELRA is functionally equivalent to "collective bargaining" as it existed under NIRA and BCCA, because "each of these three Acts were concerned with * * * providing the framework [231] for the establishment of a

⁹¹³ 295 U.S. 495 (1935).

⁹¹⁴ 298 U.S. 238 (1936).

⁹¹⁵ T. at 1334-35 (Professor Krauss), 5189-91 (Professor Derber).

⁹¹⁶ *Id.* at 5177.

⁹¹⁷ § 7, 48 Stat. at 198-99.

⁹¹⁸ T. at 5181-82.

⁹¹⁹ *Id.* at 5199.

⁹²⁰ *Id.* at 5630-31.

system of collective bargaining''.⁹²¹ Again, Dr. Bradley agreed.⁹²²

Professor Krauss stated that NIRA, BCCA, and PELRA are analytically identical, in that all three conform to the basic "corporative-state" model, with the key structural element of "exclusive representation" present in each instance.⁹²³ Dr. Bradley confirmed this conclusion: "There's no problem in interrelating [NIRA, BCCA, and PELRA]. Of course, they're interrelated."⁹²⁴ Relying on the statute and the facts set out in the Supreme Court's opinion in *Schechter*, Professor Krauss explained that NIRA was a corporative-state arrangement because

⁹²¹ *Id.* at 5291.

⁹²² *Id.* at 5631.

⁹²³ *Id.* at 1342 (BCCA structurally equivalent to PELRA), 1352-53 (BCCA structurally equivalent to NIRA), 1353-54 (NIRA structurally equivalent to PELRA), 1341-42 (BCCA fits corporative-state model), 1353 (NIRA fits corporative-state model), 324-28 (PELRA fits corporative-state model). The relationships appear graphically in PTE Nos. 55-58.

Professor Krauss used the term "corporative state" to describe the basic structure of NIRA, BCCA, and PELRA, and testified that the "corporative-state model" is a general structural model widely used in political economy. Evidently, however, the structural equivalence of NIRA, BCCA, and PELRA does not depend on whether the corporative-state model is a general one, or one that fits NIRA, BCCA, and PELRA only. If NIRA, BCCA, and PELRA are structurally equivalent because they share attributes X, Y, Z, and so on (which Professor Krauss described, for the purposes of his testimony, as "corporative-state" attributes), they remain structurally equivalent even if no other statutory systems share those attributes. Moreover, the label "corporative state" is not controlling. Even if Professor Krauss had coined that term solely to describe the interrelationship among NIRA, BCCA, and PELRA, the interrelationship would still exist.

⁹²⁴ T. at 5626.

there was exclusive representation with respect to the trade association [and] * * * the employees' group. There was compulsory [232] collective bargaining between these groups. And there was a process of political bargaining * * *. The outcome of collective bargaining * * * had to be approved * * * by the Federal government.⁹²⁵

Relying on the statute and the facts set out in the Supreme Court's opinion in *Carter*, Krauss also explained that BCCA was a corporative-state arrangement because it

had the critical elements of negotiation between the national government and the agreement that is reached between the collectivized employer and collectivized employees, * * * [and] the critical element of exclusive representation of employees and employers in their groups * * *.⁹²⁶

Then, turning from the private-sector examples of NIRA and BCCA to PELRA, Professor Krauss described how public sector corporative-state arrangements function through compulsory "collective bargaining" between government as the employer and private groups of "collectivized employees".⁹²⁷ Through such bargaining, "the government is in essence coerced to deal with these private groups".⁹²⁸ They key structural feature of the system, he stated, is "exclusive representation", "an essential, critical element", "the indispensable mechanism by which em-

⁹²⁵ *Id.* at 1350-51.

⁹²⁶ *Id.* at 1339-40. Professor Derber agreed that BCCA satisfied the basic corporative-state model. *Id.* at 5237-38.

⁹²⁷ *Id.* at 1313.

⁹²⁸ *Id.* at 1305.

ployees are collectivized".⁹²⁹ As in the private sector,⁹³⁰ "exclusive representation" in public-sector employment serves

[233] to impose conformity of opinion among the members of the collectivized group with respect to the economic variables with which the group is concerned. Now that conformity of opinion is required to engender unanimity of action. So we have conformity of opinion leading to unanimity of action on the part of the members of the collectivized group. Once again, with respect to these economic variables, you might ask why is unanimity of action required. It's required to create a monopoly of political influence. This monopoly of political influence for exclusive representatives is *the essence of the corporate state. So that once again, the essence of the corporate state is monopoly of political influence. To have monopoly of political influence you need unanimity of action. To have unanimity of action you need conformity of opinion. To have conformity of opinion you need exclusive representation.*⁹³¹

Specifically with respect to PELRA, Professor Krauss found every critical attribute of the corporative state:

You have * * * here [a] collectivized employees group with exclusive representation. You have unanimity of action and conformity of opinion satisfied. You have

⁹²⁹ *Id.* at 1305, 1308, 1318-19, 1404, 1406.

⁹³⁰ *Id.* at 1314-15. Professor Derber concurred on this point: "[W]ith regard to the exclusive representation idea, I don't see any essential difference between the public and the private sector". *Id.* at 5158.

⁹³¹ *Id.* at 1307-08 (Professor Krauss) (emphasis supplied).

the government * * * and * * * compulsory collective bargaining, so all the elements are present.⁹³²

Professor Derber and Dr. Bradley further reinforced the connexion all the expert-witnesses agreed exist among NIRA, BCCA, and PELRA by explaining how compulsory "collective bargaining" under PELRA involves a delegation of governmental power to private groups.⁹³³ Professor Derber testified that public-sector "collective bargaining" through "exclusive [234] representation" provides organized public employees with a special procedure, not available to other interest groups, for influencing the determination of their terms and conditions of employment.⁹³⁴ Organized public employees enjoy this special procedure in addition to their traditional participation in the normal political process of elections and lobbying—thereby having *more* opportunity to influence the determination of their terms and conditions of employment than other citizens have.⁹³⁵ Specifically with regard to the application of PELRA in the community colleges, Derber explained how the statute's requirement that college administrators negotiate terms and conditions of employment with MCCFA "is a sharing of responsibility for [that] particular function". "The legislature is in effect saying that in the management of our governmental system in this state and these agencies it is appropriate for the union to have a certain [share]

⁹³² *Id.* at 1326-28.

⁹³³ In both *Schechter* and *Carter*, the central fact on which the Court's decisions turned was the delegation of power to private groups to make "economic laws" binding on dissenters. *Schechter*, 295 U.S. at 537; *Carter*, 298 U.S. at 311.

⁹³⁴ *T.* at 5254.

⁹³⁵ *Id.* at 5256, 5265 (Professor Derber). See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 228-29 (opinion of Stewart, J.), 257-58 & n.12, 261 & n.15 (Powell, J., concurring in the judgment) (1977).

in the decision-making.”⁹³⁶ Dr. Bradley agreed that public-sector bargaining delegates governmental power from public officials to private organizations of employees: “What happens under PELRA * * * is that there is a very substantial shift in the locus of [235] decision-making from * * * public authorities * * * to private [collectivities].”⁹³⁷

Mr. Petro summarized the effect of “exclusive representation” on governmental sovereignty by explaining that,

[w]ith respect to governmental sovereignty, compulsory public sector collective bargaining is an absolute contradiction in which the governmental sovereignty that our system was designed to establish cannot continue to exist. There is no way in which governmental sovereignty can survive the existence of an absolute duty to bargain with an agency to which the employees of the government owe allegiance.

For governmental sovereignty, according to the opinion of all of the great writers in the field, implies the supreme and undivided power to rule the community, a power which brooks no challenge. A power * * * where there is * * * essentially a legitimate challenge implies that not orderly government but anarchy is prevailing.

.

[C]ompulsory public sector bargaining guarantees a state of affairs that’s incompatible with governmental

⁹³⁶ T. at 5242-43. In the historical evolution of compulsory public-sector “collective bargaining”, said Derber, “there was an increasing conviction [among proponents of bargaining] that the idea of absolute sovereignty * * * was no longer an acceptable idea, namely, that governmental bod[ies], like State Legislatures, did have the right and the power to delegate various of these responsibilities or to share them * * * with private groups”. *Id.* at 5167.

⁹³⁷ *Id.* at 5647.

and popular sovereignty mainly because it tends to divert the sentiment and the loyalty of public employees away from the government and the public to the representative which these laws have taught them to believe is mainly the agency that's going to represent their interests.

* * * *

The consequence, therefore, is that these public sector bargaining laws * * * are well designed to break down the loyalty of public employees to their public employer directly and to the community indirectly as witnessed by the numerous strikes that occur in states in which there are compulsory public sector bargaining laws.⁹³⁸

[236] Mr. Petro also outlined the critical factors in the community colleges subtending the conclusion that public-sector "collective bargaining" under PELRA violates governmental and popular sovereignty: namely, that (i) MCCFA is a private organization, not controlled by or subordinate to any agency of the State of Minnesota; (ii) MCCFA is the "exclusive representative" for community-college faculty for the purposes of "collective bargaining" under PELRA; (iii) as exclusive representative under PELRA, MCCFA can require college-administrators to "meet and negotiate" and "meet and confer" with it concerning terms and conditions of employment, and enforce this requirement through "unfair-labor-practice" proceedings; and (iv) under certain circumstances, MCCFA has a statutory privilege to conduct strikes.⁹³⁹

⁹³⁷ *Id.* at 1743-44, 1758-59. Plaintiffs themselves testified that, in the community college, this breakdown in the loyalty of public employees to their employer is a consequence of the adversarial relationship MCCFA has fostered. PFF Nos. 264-67.

⁹³⁹ T. at 1745-53, 1767-73, 1788-90. On MCCFA's exercise of this license to strike, *see* PFF Nos. 268-70.

In sum, the expert-witnesses agreed that "exclusive representation" under PELRA is a contemporary example of the selfsame corporative-state arrangements that existed under NIRA and BCCA, and that the Supreme Court unanimously declared unconstitutional in *Schechter* and *Carter*. This Court, of course, has no power *sub silentio* or even *viva voce* to overrule, limit, qualify, or treat as irrelevant these decisions of the Supreme Court.⁴⁰ Neither has it any power to attempt to [237] prevent the issue Plaintiffs and the Defendant State Officials developed from reaching that tribunal by pretending that the record did not contain the facts as Plaintiffs have just outlined them. Rather, it must now supplement its findings to reflect the testimony the expert-witnesses gave.

B. This Court's refusal to address the issue of the political-economic structure and effects of "exclusive representation" in the community colleges implies that the astonishing proposition that the State of Minnesota may impose on community-college faculty a system with fewer safeguards than Italian fascism had, without violating the Constitution.

The only conceivable legal basis that this Court could even arguably have for refusing to make findings based on the testimony of the expert-witnesses on political economy, economics, labor and industrial relations, and political theory is that the testimony addressed an issue not in this case, irrelevant to the issues presented for decision, or so without merit as to be properly characterized as "frivolous". As Plaintiffs have already noted, the issue of the unconstitutionality of "exclusive representation" under

⁴⁰ *E.g.*, *United States v. Crocker*, 420 F.2d 307, 309 (8th Cir. 1970) (Heaney, J.); *Kibby v. United States*, 372 F.2d 598, 601 (8th Cir. 1967) (Van Oosterhout, Gibson, & Heaney, JJ.); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Internat'l*, 373 F.2d 136, 140 (8th Cir. 1967).

the *Schechter* and *Carter* doctrine has been central to this litigation from the beginning. And, to be "frivolous", the "unsoundness" of an issue must "so clearly resul[t] from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questio[n] sought to be raised can be the subject of controversy".⁹⁴¹ In light of the Supreme Court's unequivocal and categorical holding [238] in *Carter*,⁹⁴² Plaintiffs suggest that, if any issue is "frivolous" in the constitutional sense, it is that "exclusive representation" is valid under the First and Fourteenth Amendments. But certainly, in the light of *Carter*, no rational person can say that Plaintiffs' contentions have been "foreclose[d]" adversely to them or can no longer be "the subject of controversy".

None the less, the Court's findings say nothing about the testimony of the expert-witnesses—leading Plaintiffs to conclude that this Court considers the "corporative-state" issue "frivolous". Nothing, however, could be more wrong than such a view. For, to believe the corporative-state issue to be frivolous, one would necessarily also have to believe that the State of Minnesota has constitutional authority to impose on Plaintiffs and all other citizens of that State

⁹⁴¹ *Goosby v. Osser*, 409 U.S. 512, 518 (1973).

⁹⁴² *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936):

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may and often are adverse to interests of others in the same business. * * * And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty * * *. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause * * *, that it is unnecessary to do more than to refer to decisions of this court which foreclose the question.

a system of political-economic relations in comparison to which Italian fascism appears reasonable and restrained.

Here, brief adversion to history would be profitable. *Pre-World War II* Italy provides a paradigmatic case-study of [239] the evolution, structure, and results of corporative-state institutions and arrangements. Between World Wars I and II, partisan struggles among special-interest groups convulsed the Italian polity. As people there came to realize that their government exercised power on behalf of narrow interests, rather than confronting social problems from the perspective of the common good, they lost respect for the political process. Simultaneously, their inability to attain their goals within traditional political institutions caused organized interest-groups to demand special channels through which to influence governmental policy. Out of these conditions arose the corporative state of Italian fascism.⁹⁴³

As is common knowledge,

the corporate state is a view of society that sees the community as composed of diverse economic or functional groups * * * ; in theory it would make the basic governmental unit the group or corporate body rather than the individual. Members of the central governing body would represent specific functional groups * * * .

Corporativism was an important feature of Italian Fascism * * * .

* * *

Italy. * * * the corporate organization evolved out of the peculiar Fascist unions, or syndicates * * * .⁹⁴⁴

⁹⁴³ See generally R. Sarti, *Fascism and the Industrial Leadership in Italy, 1919-1940* (Berkley, Calif: Univ. of California, 1971), especially at 140-42.

⁹⁴⁴ 6 *Encyclopaedia Britannica*, "Corporate State", 524 (1963 ed.)

For a complete analysis of Italian fascism, see, e.g., G. Field,

[240] In particular, Italian fascists advocated the necessity of organizing individuals into groups according to their supposed economic alignments, structuring these groups of employees (*sindacati*) and employers (*consorzi*) according to the principle of "majority-rule", and then providing each employer-employee unit (*corporazione*) with special political influence in the highest councils of government. Central and essential to this system was "exclusive representation": The privilege "of existing as a separate legal entity and of representing all the members of a given occupational group whether they belong to the syndicate or not, [was] the fundamental prerogative of the Fascist syndical association".⁹⁴⁵

The Syndical and Corporate Institutions of Italian Fascism (Ph.D. Thesis, Columbia Univ., 1938); B. Mussolini, *Speeches on the Corporate State* (Firenze, Italy: Vallecchi, 1936); F. Pitigliani, *The Italian Corporate State* (London: P.S. King & Son, 1933), R. Sarti, *ante* note 943; G. Tassinari, *Fascist Economy* (Rome, Italy: Laboremus, 1937); W. Welk, *Fascist Economic Policy* (Cambridge, Mass.: Harvard Univ. Press, 1938).

⁹⁴⁵ W. Welk, *ante* note 944, at 76. Typical are the following provisions of fascistic law: "Only one [syndical] association for each class of * * * workers * * * shall be recognized by law." Law of 3 April 1926, No. 563, On the Legal Discipline of Collective Labor Relations, art. 6. "[O]nly a syndicate legally recognized * * * has the right legally to represent the entire class of * * * workers for which it has been formed, * * * to negotiate collective labor agreements binding upon all members of that class, to levy contributions and to exercise such functions of public interest as may be delegated to it." Charter of Labor, art. III. "Collective labor agreements, negotiated by legally recognized [syndical] associations of * * * employees, shall apply to all the * * * employees * * * of the professional class to which the collective arrangement refers and whom such associations represent * * *." Law of 3 April 1926, *ante*, art. 10. "Legally recognized syndical associations shall be empowered to stipulate collective labor agreements." Royal Decree of 1 July 1926, No. 1130, art. 47.

Even the fascist corporative state was not without purported "safeguards", however. First, the system *included* the largest and most politically influential special-interest groups in the Italian economy. Second, and telling here, it *excluded* public employees from almost all syndical [241] privileges.⁹⁴⁶ The Italians explained this exclusion on a four-fold basis: (i) Public employees need no special syndical privileges to protect themselves against government, which by hypothesis represents the general interest, including their own.⁹⁴⁷ (ii) Public employees owe complete loyalty to the government and the people, and cannot compromise that loyalty [242] by forming politically active

⁹⁴⁶ Many Italian public employees could organize syndical associations; but these organizations had no special political privileges within the corporative state, and were subject to dissolution at any time. The following provisions of fascist law summarize the situation: "Associations of state, provincial, and municipal employees * * * shall have to be authorized [by the government]." Royal Decree of 1 July 1926, No. 1130, art. 92. "Authorization shall not imply legal recognition * * *." *Id.* "No collective labor agreements shall be stipulated concerning labor relations regulated by acts of public authority * * *." *Id.* art. 52. "The Head of Government may order the dissolution of the associations of state, provincial, and municipal employees * * * whenever their activities shall be incompatible with good order and the discipline of public service." *Id.* art. 93.

⁹⁴⁷ H.W. Schneider, *Making the Fascist State* (N.Y.: Oxford Univ. Press, 1928, reprinted 1968), at 184, quotes the following legislative history from the Fascist Chamber of Deputies:

The relations between public political agencies and their employees are by their very nature such that they do not admit of legally recognized syndical organization, for it is inconceivable that the laws should recognize organs of defense for any categories or classes by whom they would be directed against bodies which represent the general interest. These bodies already have obligations toward their dependents which exclude them from the realm of private contracts. To treat their dependents justly

syndical associations.⁹⁴⁸ (iii) Public employees perform managerial duties on behalf of the state and, in that sense, *are* the state.⁹⁴⁹ And (iv) the function of government in the corporative state is to arbitrate differences between private interest-groups—a function it cannot fulfill if its own employees become one of the contending parties, rather than remaining neutral.⁹⁵⁰ Even more specifically applicable here, Italian fascism absolutely outlawed syndical associations for “professors in intermediate and higher institutions of learning”, on the ground that their educational

is already an obligation of the state and other public bodies, which they must keep because of their inherently ethical nature.

Revealingly, the Supreme Court has endorsed the same rationale for denying public employees special legal privileges against the government. *United States v. United Mine Workers*, 330 U.S. 258, 270-76 (1947).

⁹⁴⁸ Again, revealingly, the Supreme Court has endorsed the idea that public employees own loyalty to government, and to no one else. *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968). This, of course, is merely a specific application of a general principle of employer-employee relations. *E.g.*, *NLRB v. Yeshiva Univ.*, — U.S. —, —, 100 S. Ct. 856, 862 (1980) (“an employer is entitled to the undivided loyalty of its employees”), *citing* *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661-62 (1974); *and* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 281-82 (1974).

⁹⁴⁹ The Supreme Court has recently held that university faculty may be part of management, depending upon the authority instructors exercise. *NLRB v. Yeshiva Univ.*, — U.S. —, —, 100 S. Ct. 856, 862-66 (1980).

⁹⁵⁰ That government is a neutral arbiter of, and not an interested party in, political disputes, is also a basic premiss of the American political system, and particularly the First Amendment. *See* Kamenshine, “The First Amendment’s Implied Political Establishment Clause”, 67 *Cal. L. Rev.* 1104 (1979).

responsibilities were inconsistent with organized political involvement.⁹⁵¹

[243] In short, even the Italian fascists recognized that permitting public employees, and especially professors, to organize politically active syndical associations and to exercise special political influence on the course of governmental decision-making posed extreme dangers to the efficiency and good order of government and, ultimately, to social stability itself. And the very reasons they enunciated, and the methods they employed, to ban public-employee syndicates the Supreme Court has consistently advanced or upheld whenever it was necessary to limit the politicization of the public service in this country,⁹⁵² and in that rare instance when restraints on the politicization of private employment also were imperative.⁹⁵³

⁹⁵¹ H.W. Schneider, *ante* note 947, quotes *Il Duce* Benito Mussolini himself as follows:

There are other dependents of the state whose associations should be prohibited. The lists * * * will include professors in intermediate and higher institutions of learning. * * * Let us say it clear and loud: The professor fulfills a function in national life much more delicate than that performed by the official of a public service or by the magistrate. The professor, who molds minds and consciences, * * * has an extremely important function in the life of the nation. Hence he must be an atom, not a group or association, in the state.

The Supreme Court has also commented extensively on the peculiarly important role of teachers in American society. *E.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Wieman v. Updegraff*, 344 U.S. 183, 195-96 (1952) (Frankfurter, J., concurring).

⁹⁵² *E.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976); *Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

⁹⁵³ *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

Apparently, in the State of Minnesota the old adage holds true that "the only thing one learns from history is that no one ever learns anything from history". For in this State, Defendants have applied PELRA to institute a system fundamentally fascistic in character, *but devoid of the minimal safeguards even the Italian fascists demanded*. Here, as in Italian fascism, [244] the State has licensed the UTP, a syndical employee-organization, to mobilize "professional people into goose-stepping brigades" of political conformists,⁹⁵⁴ and to use "exclusive representation" as a special channel through which to influence governmental policy. Neglecting the safeguards even fascism demanded, however, the State has discriminatorily limited PELRA's peculiar scheme of coerced political solidarity and "influence-peddling" to the UTP—denying such groups equally interested in public education as students, parents, and taxpayers any opportunity to intervene in community-college policy-formation through channels of "meet and negotiate" and "meet and confer".⁹⁵⁵ And, in

⁹⁵⁴ *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting) (footnote omitted).

⁹⁵⁵ *Contrast PFF Nos. 221-29 with Doremus v. Board of Educ.*, 342 U.S. 429, 435 (1952) (Douglas, J., dissenting) ("There is no group more interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them.").

Surely Italian fascists would be shocked to see that, although the State of Minnesota enables one special-interest group, the UTP, to exercise extraordinary political influence over governmental decision-making in an area of particular concern to it (through "exclusive representation" in the colleges) and in other areas as well (through techniques of political activism "exclusive representation" enhances), it provides no similar privileges for such identifiable groups as farmers, industrial wage-earners, manufacturers, or consumers to negotiate or confer under aegis of state law with public officials, or to compel political conformity among themselves

exacerbation of this, the State has conferred these monopolistic political licenses on a militant, self-interested, nationwide political-action organization that: (i) comprises (at least in the community colleges) "professors in * * * higher institutions of learning", the very group the chief architect of Italian fascism excluded from syndical [245] privileges because of the dangers its inclusion threatened; and (ii) openly boasts of its disbelief in the public interest, identifies itself as a special-interest group, and candidly acknowledges its goal to acquire a "base of political power" and "leadership position" from which to wage political struggle against the public and the public's agents.⁹⁵⁶

Therefore, even if Italian fascism itself were constitutional under the First and Fourteenth Amendments, which it cannot be, PELRA would none the less be invalid as going *beyond* fascism to a realm of political irresponsibility heretofore unknown in American experience.⁹⁵⁷

so as most effectively to engage in political activism on behalf of their special economic, political, and social interests. Even fascism demonstrated a greater concern for equality of political influence than does PELRA and those who support it.

⁹⁵⁶ PRS Nos. 1133-33e, 1134, 1136-43.

⁹⁵⁷ The Supreme Court has already held that a nation-wide fascistic system embracing all of private industry violates the Due Process Clause of the Fifth Amendment. *Compare* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), *with* PFF No. 197. It has also invalidated fascism in a single industry, on the same grounds. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The Fifth and Fourteenth Amendments, of course, impose the selfsame restraint on governmental action in terms of due process. *Heiner v. Donnan*, 285 U.S. 312, 326 (1932).

Moreover, any form of fascism necessarily violates the Fourteenth Amendment's Equal Protection Clause—because fascism always licenses some groups (organized on the basis of economic function, social position, or other characteristics) to exercise more

[246] Yet this Court studiously refrains from saying anything about the issue—an issue central to this case and the correct resolution of which is vital to the preservation of traditional American political institutions. For this reason alone, its findings must be amended.

political influence than others. And no principle of constitutional jurisprudence is more unequivocal than that statutory schemes mandating political inequality cannot stand, even if they promote or defeat particular “good” or “bad” political views; “balance” political power among competing interest-groups; encourage “political stability”; solve “practical problems” arising out of partisan politics; promote or defeat particular economic, social, or other nonpolitical interests; recognize the “special pecuniary or other interest” of one class or group in a particular governmental decision; take employment-status or wealth into account; or satisfy the demands of popular majorities. *Cipriano v. City of Houma*, 395 U.S. 701, 705 (1969); *Carrington v. Rash*, 380 U.S. 89, 93-94 (1965); *Davis v. Mann*, 377 U.S. 678, 692 (1964); *Gray v. Saunders*, 372 U.S. 368, 379-80 (1963); *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968); *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1969); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 738 & n.31 (1964); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 208-10 (1970); *Evans v. Cornman*, 398 U.S. 419, 422-26 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 630-33 (1969); *Cipriano, ante*, 395 U.S. at 704-06; *Davis, ante*, 377 U.S. at 691; *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966); *Lucas, ante*, 377 U.S. at 736-37.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court amend its findings of fact, as suggested herein, to conform to the law and to the evidence the parties adduced in the hearings before the Special Master.

Respectfully submitted,

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1 April 1982.

APPENDIX

[A-1] LEGAL APPENDIX ON "INTEGRATION"

(17 August 1979)

I. The meaning of "integration".

"Integration" means that certain sub-entities constitute parts of a single entity. Here, the sub-entities are NEA, MEA, MCCFA, IMPACE, NEA-PAC, UniServ, and their affiliates that together constitute the UTP. And the purpose of referring to their integration in the UTP is to impute to each the actions of the others with regard to political activism. Thus, if as an exclusive representative under color of Minnesota law MCCFA infringes plaintiffs' First-Amendment freedoms by itself engaging in political activity X, it is equally liable when its partner in the UTP, MEA (or NEA, IMPACE, NEA-PAC, UniServ, and so on), engages in political activity X.

For some purposes, integration might imply that various sub-entities were, for all practical purposes, identical; that each sub-entity was the agent of every other; or that some similarly strict interrelationship obtained. Here, conversely, where First-Amendment freedoms are involved, plaintiffs need establish only the minimum interconnectedness to warrant imputing the acts of each sub-entity in the UTP to every other sub-entity.¹

¹ *Compare, e.g.,* Bridges v. California, 314 U.S. 252, 263 (1941) (First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow"); Wood v. Georgia, 370 U.S. 375, 383-85 (1962); and Pennekamp v. Florida, 328 U.S. 331, 334 (1946), with the least-restrictive-alternative cases Wooley v. Maynard, 430 U.S. 705, 712 (1977) (Burger, C.J.); Elrod v. Burns, 427 U.S. 347, 363 (1976) (Brennan, White, and Marshall, JJ., plurality opinion); Young v. American Mini Theatres, Inc., 427 U.S. 50, 83-84 (1976)

[A-2] II. Methods of determining integration.

Each particular investigation and proof of integration tends to be *sui generis*, standing on its own individual

(Powell, J., concurring); *id.* at 94-96 (Blackmun, Brennan, Marshall, and Stewart, JJ., dissenting); *Hynes v. Oradell*, 425 U.S. 610, 620 (1976) (Burger, C.J.); *Greer v. Spock*, 424 U.S. 828, 852-53 (1976) (Brennan, J., Dissenting); *Buckley v. Valeo*, 424 U.S. 1, 238-39 (1976) (Burger, C.J., concurring and dissenting in part); *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 215-16 (1975) (Powell, J.); *Storer v. Brown*, 415 U.S. 724, 760 (1974) (Brennan and Marshall, JJ., concurring); *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) (Stewart J.); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-15 (1973) (White, J.) (collecting cases); *id.* at 627-28 (Brennan, Stewart, and Marshall, JJ., dissenting); *California v. LaRue*, 409 U.S. 109, 123-26 (1972) (Marshall, J., dissenting); *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972) (Marshall, J.); *Brown v. Oklahoma*, 408 U.S. 909, 912-13 (1972) (Rehnquist and Blackmun, JJ., and Burger, C.J., dissenting); *Gooding v. Wilson*, 405 U.S. 518, 522-23 (1972) (Brennan, J.); *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (Brennan, White, and Marshall, JJ., dissenting and concurring in part); *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (Stewart, J.); *United States v. Jackson*, 390 U.S. 570, 582 (1968) (Stewart, J.); *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968) (Brennan, J.); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (Stewart, J.).

These decisions teach that only the minimal possible infringements on First-Amendment liberties are permissible. Therefore, if an individual can complain of the activities of some sub-entity *A*, he need establish only a minimal connexion between *A* and its affiliate, *B*, to complain with equal force of the activities of *B*. For instance, since plaintiffs could complain were MCCFA itself to provide financial support to the campaigns of candidates for election to public office, they can complain with equal force of that activity on the part of IMPACE or NEA-PAC by demonstrating that MCCFA is sufficiently connected to these organizations and their operations to justify treating them all as integrated for First-Amendment purposes. And, because of the sensitivity of

facts.³ For this reason, courts "look through mere names to learn the real relationship" among allegedly integrated sub-parts; "and if there [A-3] is practical identity will disregard the mere formal separation into legal entities".⁴ This requires "a realistic, common sense evaluation", rather than a "technical" or "mechanical" approach.⁴ "It is", said one court, "a factual determination which cannot be resolved by the use of mathematical formulae", but instead "depends upon a careful appraisal of the overall effect of the various relationships and other circumstances present in the particular case".⁵ Moreover, the trier of fact must "look to the *essence* of the relationship, and not to its incidental trappings".⁶

Where sub-entities are allegedly integrated, to approach plaintiffs' claims against them "as if they were * * * completely separate and unrelated law suits" is fundamentally erroneous. Rather, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing

First-Amendment freedoms to the least infringement, what is "sufficient" in this case is the minimal connectedness that rationally supports the conclusion that MCCFA, IMPACE, NEA-PAC, and so on function as part of a larger, unified entity (the UTP).

² See, e.g., *Industrial Research Corp. v. General Motors Corp.*, 29 F.2d 623, 626 (N.D. Ohio 1928); *National Bond Finance Co. v. General Motors Corp.*, 341 F.2d 1022, 1023 (8th Cir. 1965); *NLRB v. Local 810, Teamsters*, 460 F.2d 1, 6 (2d Cir. 1972).

³ *Bishop v. United States*, 16 F.2d 410, 415 (8th Cir. 1926).

⁴ *NLRB v. Local 810, Teamsters*, 460 F.2d 1, 6 (2d Cir. 1972).

⁵ *SEC v. American Beryllium & Oil Corp.*, 303 F. Supp. 912, 915 (S.D.N.Y. 1969).

⁶ *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446, 453 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971), *cited in NLRB v. Local 810, Teamsters*, 460 U.S. 1, 6 (2d Cir. 1972).

the various factual components".⁷ The character and effect of an allegedly integrated activity should not be judged "by dismembering it and viewing its separate parts", but only by perceiving it as a whole.⁸ Indeed, the trier of fact must "look at the whole [A-4] picture and not merely the individual figures in it".⁹ Because integration is seldom susceptible of proof by direct testimony, to infer it from facts describing what the sub-entities do is permissible.¹⁰ But, again, "each fact is meaningful primarily as part of a pattern, and the total pattern is the most important datum of all".¹¹

Central to the question of integration are motive, opportunity, and consistency of overt acts.¹² "Motive" involves the benefits the sub-entities believe (rightly or wrongly) have accrued, or do or will accrue, from integration. "Opportunity" looks to evidence that communication, agreement, and cooperative activity was, is, or will be possible; or that specific contacts, exchanges of information, agreements, or mutual endeavors have taken, are taking, or will take place. And "consistency of overt acts" involves evidence that conduct of the sub-entities is congruent, compatible, harmonious, reinforcing, or parallel—and that,

⁷ *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962).

⁸ *United States v. Patten*, 226 U.S. 525, 544 (1913), citing *Montague & Co. v. Lowry*, 193 U.S. 38, 45-46 (1904); and *Swift & Co. v. United States*, 196 U.S. 375, 386-87 (1905).

⁹ *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1944).

¹⁰ *E.g.*, *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 612 (1914).

¹¹ *Overseas Motors, Inc. v. Import Motors, Ltd.*, 375 F. Supp. 499, 531 (E.D. Mich. 1974).

¹² *Id.* at 532.

because of the complexity, originality, unanimity, or exacting correspondence of the overt acts, the parallelism is consistent with a concert of action, rather than a fortuitous convergence of independent decisions.

[A-5] III. Sources of evidence, and locus of the burden of proof, of integration.

Various sources provide evidence of integration. For example, why an organization with nation-wide interests and activities would employ local adjuncts or agents is judicially noticeable.¹³

Again, the sub-entities may admit their integration. The documents of one sub-entity or the statements of its officers or other spokesmen, for instance, may describe itself or another sub-entity as a department or division of, or may refer to its own or to the other entity's activities or financial affairs as those of, the unified organization.¹⁴ In an

¹³ *Industrial Research Corp. v. General Motors Corp.*, 29 F.2d 623, 627 (N.D. Ohio 1928) ("The vast extent of the business of the General Motors Corporation and the variety of its enterprises are matters of such general notoriety, and the reasons why, to conduct such a diversified and extended business, it should employ corporate agencies, and so obvious, that little proof, if any, is necessary to hold the latter as mere adjuncts or agents, especially in the absence of any proof to the contrary; for the court might well take judicial notice of the extent of the business of such an extraordinary and notorious a corporation * * *").

¹⁴ *Taylor v. Standard Gas & Elec. Co.*, 96 F.2d 693, 704-05 (10th Cir. 1938); *Industrial Research Corp. v. General Motors Corp.*, 29 F.2d 623, 627 (N.D. Ohio 1928) ("[T]he annual reports of the General Motors Corporation, setting forth * * * the Chevrolet Motor Company, as a division * * *, and a classification of the manufacturing and selling channels by which the overhead corporation has contacts with the public, leave little room for doubt,

official proceeding, one sub-entity may characterize another as its "hand", or "arm", or other tool or means to achieve its own purposes, or the purposes of the unified organization.¹⁵ [A-6] Advertising or other public pronouncements of the unified organization or one of its subdivisions may label that or other subdivisions as such.¹⁶ Or an organizational newsletter or other publication, official minutes, or speeches and correspondence of officers may reveal that personnel of the various sub-entities consider themselves engaged in interlocking activities in an integrated structure, or may report that different sub-entities have cooperated, are cooperating, or intend to cooperate in some endeavor.¹⁷

not merely of the subsidiary character of the Chevrolet Motor Ohio Company and the General Motors Truck Company, but that these are mere conveniences employed by the principal movants in the transaction of their business * * *").

¹⁵ *E.g.*, *Centmont Corp. v. Marshall*, 68 F.2d 460, 465-66 (1st Cir. 1933) (record of hearing before state department of public utilities).

¹⁶ *Industrial Research Corp. v. General Motors Corp.*, 29 F.2d 623, 627 (N.D. Ohio 1928).

¹⁷ *NLRB v. Local 810, Teamsters*, 460 F.2d 1, 4 (2d Cir. 1972) (newsletter); *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 389-91 (9th Cir.) (pricing schedule, questionnaire, organization's "President's Message", minutes of annual meeting, speech of official, minutes of board meeting, letter from official, newsletter), *cert. denied*, 371 U.S. 862 (1962); *United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29, 34-35 (D. Utah 1962) (newsletter). Of interest in *Utah Pharmaceutical* is the Court's comment that, "[i]f we discount these and similar statements [in the newsletter] as partly promotional rather than factual in nature, yet the agreement and intent remain". 201 F. Supp. at 35. Evidently, goals, purposes, and hopes can establish integration as well as actual deeds.

Evidence may also appear in provisions of a sub-entity's charter, constitution, by-laws, or other organic documents that empower that entity to exercise some authority over another sub-entity; in the actual ability of one sub-entity to determine or control another entity's officers or members; in transfers of substantial funds among various sub-entities; and in parallel activities.¹⁸

[A-7] Mere conclusory denials in affidavits cannot preclude a finding of integration in the face of "uncontested underlying facts" adduced by plaintiffs.¹⁹ When facts relating to integration are within defendants' knowledge, and defendants fail to produce them, "all evidence is to be weighed in accordance" with that failure; and the facts not proven "are presumed not to exist".²⁰ And, of course,

¹⁸ *E.g.*, FEC Reg. § 110.3(a)(1)(iii) (1977):

(iii) * * * indicia of establishing, financing, maintaining, or controlling may include—

* * * *

(B) Provisions of by-laws, constitutions, or other documents by which one entity has the authority, power, or ability to direct another entity;

(C) The authority, power, or ability to hire, appoint, discipline, discharge, demote, or remove or otherwise influence the decision of officers or members of any entity;

(D) Similar patterns of contributions;

(E) The transfer of funds between committees which represent a substantial portion of the funds of either the transferor or transferee committee * * *.

¹⁹ *SEC v. American Beryllium & Oil Corp.*, 303 F. Supp. 912, 916 (S.D.N.Y. 1969).

²⁰ *Industrial Research Corp. v. General Motors Corp.*, 29 F.2d 623, 626, 627 (N.D. Ohio 1928).

When plaintiffs' proof supports the inference of integration, the burden rest[s] on [defendants] of going forward with the

this burden of going forward with [A-8] the evidence is in addition to the burden of proof upon a party claiming a privilege, under color of law, to infringe another party's First-Amendment freedoms.²¹

evidence to explain away or contradict it. * * * The failure under the circumstances to call as witnesses those officers who did have authority to act * * * and who were in a position to know * * * is itself persuasive that their testimony, if given, would have been unfavorable to [defendants]. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character.

Interstate Circuit, Inc. v. United States, 306 U.S. 208, 225-26 (1939), *citing* *Clifton v. United States*, 45 U.S. (4 How.) 242, 247 (1846); *Runkle v. Burnham*, 153 U.S. 216, 225 (1894); *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896); *Bilokumsky v. Tod*, 263 U.S. 149, 153, 154 (1923); *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 111, 112 (1927); *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52 (1927); *Local 167 v. United States*, 291 U.S. 293, 298 (1934).

²¹ *E.g.*, *Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945); *United States v. CIO*, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne County*, 393 U.S. 175, 181 (1968); *DeGregory v. Attorney General*, 383 U.S. 825, 829 (1966); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958).

The defendants can satisfy this burden of proof only with clear and convincing evidence. *E.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50-52 (1971) (opinion of Brennan, J.).

IV. The factual indicia of integration.

Two sub-entities are integrated where one "constitute[s] an integral part in the operations of", "maintain[s] a significant involvement in the operations of", or is "responsive to the needs of demands of", the other.²² Integrated sub-entities manifest "a unity of purpose or a common design and understanding",²³ and engage in "joint, collaborative action."²⁴

[A-9] Specifically, various sub-entities throughout the country are integrated where "[t]he existence of the [national-level branch] as an organization depends on its several units or agencies called Locals which are created by and coordinated under the government of the [national-level branch] and through whom and the membership whereof the [national-level branch] has being and acts in the achievement of its and their stated objects". Where a nation-wide association "grants rights and imposes duties on its individual members wherever located", and "claims every state of the Union as its field of operation through the establishment in those states of component parts of its organization, and by which units or agencies it engages in activities designed to further the objects for which it was organized, which objects can be achieved only through the operation of its units", such an association and its sub-

²² Treas. Reg. § 1.509(a)-4(f)(3) (1978).

²³ Kiefer-Stewart Co. v. Joseph E. Seagram and Sons, Inc., 340 U.S. 211, 213 (1951).

²⁴ United States v. General Motors Corp., 384 U.S. 127, 140 (1966).

²⁵ Moran v. International Alliance of Theatrical Stage Employees, 139 N.J. Eq. 561, —, 52 A.2d 531, — (Ch. 1947) (national-level branch amenable to service of process in any jurisdiction where an affiliated local branch operates).

entities are integrated.²⁵ Indicative of an integrated membership-organization are a unified membership- and dues-structure,²⁶ a unified program-structure,²⁷ or a governance-structure subsuming all [A-10] the sub-entities under a parent constitution and by-laws.²⁸

That one sub-entity is the special-purpose "tool" or "arm" of another evidences integration. Characteristically, one sub-entity "is organized for a special purpose" by another sub-entity that "dominates and controls its affairs";²⁹ the subservient entity "exist[s] only to serve" the dominant one;³⁰ it "manifests no separate * * * interests", is "used to further the purposes of the dominant [entity] and * * * in reality ha[s] no separate, independent existence of its own";³¹ or the dominant entity carries out

²⁵ Under a "unified membership- and dues-structure", a member of a local-level branch of the organization must also be a member of the state- and national-level branches, and pay membership-dues to all three.

²⁷ Under a "unified program-structure", local-, state-, and national-level branches cooperate in various ways according to a master-program, or set of goals, plans, and so on.

E.g., FEC Reg. § 110.3(a)(1)(ii)(D) (19) :

All of the political committees * * * set up by a membership organization, including trade and professional associations, * * * and/or by related State and local entities of that organization or group are treated as a single political committee * * *.

²⁶ Welfare & Pension Funds, 178 N.L.R.B. No. 3, at 14 (1969) (that local "is considered to be a subordinate body under the parent's constitution and bylaws" indicates integration).

²⁹ *Centmont Corp. v. Marsch*, 68 F.2d 460, 464 (1st Cir. 1933).

³⁰ *Darling Stores Corp. v. Young Realty Co.*, 121 F.2d 112, 115 (8th Cir. 1941).

³¹ *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp.*, 483 F.2d 1098, 1105-06 (5th Cir. 1973).

its purposes through the "tool" or "arm".³² A finding of integration is appropriate, for instance, where one entity was organized to avoid a tax applicable to another, and the new entity would not have been organized absent the tax;³³ where one entity was created for the "single" or "express purpose of violating the provisions of a statute" for the benefit of another;³⁴ or where one entity performs tasks that, but for [A-11] its existence, the other entity would perform.³⁵ Often, the organic documents of the sub-entity serving as the "tool" or "arm" establish its integrated, subservient nature, as by: limiting its purposes to those that benefit the dominant entity; not empowering it to engage in activities not in furtherance of such purposes; identifying the dominant sub-entity as the organization for the benefit of which the "tool" or "arm" functions; or not empowering the subservient entity to operate on behalf of any other organization.³⁶

³² Treas. Reg. § 1.509(a)-4(g) (1978) (one entity "operated, supervised, or controlled by" another entity, or operated "for the benefit of" that entity, where purposes of subservient entity carried out by benefitting dominant entity).

³³ *E. Albracht & Son v. Landy*, 114 F.2d 202, 203-04 (8th Cir. 1940).

³⁴ *Nichols & Co. v. Secretary of Agriculture*, 131 F.2d 651, 656-57 (1st Cir. 1942).

³⁵ Treas. Reg. § 1.509(a)-4(i)(3)(ii) (1978); *NLRB v. Local 459, Radio & Machine Workers*, 228 F.2d 553, 558-59 (2d Cir. 1955).

³⁶ Treas. Reg. § 1.509(a)-4(e)(1) (1978). The organic documents of the "tool" or "arm" need not identify the dominant entity by name if the "tool" is "operated, supervised, or controlled by * * *, or is supervised or controlled in connection with" the dominant entity. Treas. Reg. § 1.509(a)-4(d)(1), -4(d)(2)(a), -4(g), -4(h) (1978).

Control of one sub-entity by another, and their mutual integration, invariably go hand in hand. "Control" denotes one entity's "possession, direct or indirect, of the power to direct or cause the direction of the management and policies" of another entity.³⁷ Because this power may exist even though not continuously or actively exercised, proof of it turns upon the particular circumstances of each case.³⁸ First, the organic documents of one entity may empower or enable it to direct another entity;³⁹ the members of a local branch of an integrated [A-12] organization may be subject to, or may agree to do nothing inconsistent with, the constitution and by-laws of the state or national branches;⁴⁰ or one entity may have authority to suspend or expel another entity's members from the unified organization.⁴¹ Second, one entity may substantially direct the policies, programs, or activities of another—as where "a majority of the officers, directors, or trustees" of the latter entity are "appointed or elected by the governing body, members of the governing body, officers * * *, or the membership" of the former.⁴² One sub-entity may be "responsive to the needs or demands" of another where "[one or more officers, directors, or] members of the governing bodies of the [latter] are also officers, directors, or trustees

³⁷ SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912, (S.D.N.Y. 1969), *quoting from* Securities Act Rule 405, 17 C.F.R. § 230.405(f) (19—).

³⁸ Pennaluna & Co. v. SEC, 410 F.2d 861, 866 (9th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970).

³⁹ FEC Reg. § 110.3(a)(1)(iii)(B) (1977).

⁴⁰ Local 249, Teamsters, 139 N.L.R.B. No. 39, at 605, 605 (1962); United States v. Fish Smokers Trade Council, Inc., 183 F. Supp. 227, 228-34 (S.D.N.Y. 1960).

⁴¹ NLRB v. Annapolis Emergency Hospital Ass'n, 561 F.2d 524, 539 (4th Cir. 1977) (opinion of Winter, J., in Appendix to opinion of the Court).

of, or hold other important offices in, the [former]"; or where the "officers, directors, or trustees of the [former] maintain a close and continuous working relationship with the officers, directors, or trustees of the [latter]".⁴³ Third, there may be overlapping or centralized supervision and control among the governing bodies of [A-13] the various sub-entities⁴⁴—as where the entities have common directors or officers,⁴⁵ or certain individuals occupy "commanding position[s] in the interlocking * * * structure".⁴⁶ Fourth, individuals connected with one sub-entity may, by aggregating their votes or cooperatively exercising their authority in the governing bodies of another entity, be able to require or to prevent that entity from adopting some policy or practice, or from performing some act, that substantially affects its operations.⁴⁷ Fifth, one sub-entity may

⁴³ Treas. Reg. § 1.509(a)-4(g)(1)(i) (1978). *E.g.*, *Wabash Ry. v. American Refrigerator Transit Co.*, 7 F.2d 335, 339, 343 (8th Cir. 1925) (certain companies "dominated and controlled the business and affairs of [other] companies by the election of their officers and agents as a majority of the members of the boards of directors of [the other] companies").

⁴⁴ Treas. Reg. § 1.509(a)-4(i)(2)(a-c) (1978). *Accord*, FEC Reg. § 110.3(a)(1)(iii)(C) (1977) (indicia of "control" include "authority, power, or ability to hire, appoint, discipline, discharge, demote, or remove or otherwise influence the decision of the officers or members of an entity").

⁴⁵ Treas. Reg. § 1.509(a)-4(f), -4(h)(i), -4(i)(a)(ii)(b, d) (1978).

⁴⁶ *E.g.*, *FTC v. Cement Institute*, 333 U.S. 683, 719 (1948); *NLRB v. Jones Sausage Co.*, 257 F.2d 878, 879-80 (4th Cir. 1958); *Taylor v. Standard Gas & Elec. Co.*, 96 F.2d 693, 704-05 (10th Cir. 1938); *Local 10, Seafarers*, 138 N.L.R.B. No. 30 at 1142, 1147-48, 1152 (1962); *Chemical Express*, 117 N.L.R.B. 29, 30 (1957).

⁴⁷ *NLRB v. Local 810, Teamsters*, 460 F.2d 1, 3 (2nd Cir. 1972).

⁴⁸ Treas. Reg. § 1.509(a)-4(j)(1) (1978); *Rochester & Pittsburg Coal Co.*, 56 N.L.R.B. No. 313, at 1760, 1763 (1944).

have the power to appoint a manager for another entity,⁴⁸ or the right to intervene in its operations by making evaluations of or training its personnel.⁴⁹ And sixth, officials of one sub-entity may take a "prominent part in [the] affairs" of another,⁵⁰ or "maintain a close and continuous working relationship with [its] officers, directors, or trustees".⁵¹

[A-14] Even absent "control", integration may still exist because of various interdependencies among the sub-entities. For instance, one entity may "maintain a significant involvement in the operations" of another, with the other "in turn dependent upon [it] for the type of service which it provides".⁵² Or, again, the "operation and success of each [entity in a group]" may be "interrelated with and heavily dependent upon the other members of the group performing their assigned tasks".⁵³

Business connexions among entities can also prove integration. Formal contractual relations, of course, constitute strong evidence. Of like value is an exclusivity of relations, as where one entity sells almost all of its product to another,⁵⁴ or has "nearly all" or a "substantial portion" of its business with, or has "substantially no business ex-

⁴⁸ *Costan v. Manila Elec. Co.*, 24 F.2d, 383, 384-85 (2d Cir. 1928).

⁴⁹ *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 906 (9th Cir. 1964), *cert. denied*, 379 U.S. 961, *rehearing denied*, 380 U.S. 926 (1965).

⁵⁰ *Alaska Salmon Industry, Inc.*, 78 N.L.R.B. No. 32, at 185, 188 (1948).

⁵¹ *Treas. Reg.* § 1.509(a)-4(i)(2)(ii)(c) (1978).

⁵² *Treas. Reg.* § 1.509(a)-4(i)(3)(i) (1978).

⁵³ *NLRB v. Local 810, Teamsters*, 460 F.2d 1, 6 (2nd Cir. 1972).

⁵⁴ *NLRB v. Jones Sausage Co.*, 257 F.2d 878, 879-80 (4th Cir. 1958).

cept with'', the other entity.⁵⁵ Similarly, cooperative efforts on various activities are probative,⁵⁶ as are one entity's efforts to promote its [A-15] own, and its members', participation in another entity's activities.⁵⁷

That various sub-entities regularly transfer monies among themselves also supports integration. In a unified, nation-wide membership-organization, for example, local branches may pay so-called "per capita taxes" to the state or national branches;⁵⁸ or the state or national branches, by remitting a portion of organizational dues to the locals, may control the locals through "the power of the purse".⁵⁹

⁵⁵ Local 728, *Truck Drivers v. Empire State Express, Inc.*, 293 F.2d 414, 423 & n.22 (5th Cir. 1961); *Crenshaw's Inc.*, 115 N.L.R.B. 1374, 1376 (1956); *Taylor v. Standard Gas & Elec. Co.*, 96 F.2d 693, 704-05 (10th Cir. 1938).

⁵⁶ Particularly illustrative is *NLRB v. Annapolis Emergency Hospital Ass'n*, 561 F.2d 524, 538-39 (4th Cir. 1977) (opinion of Winter, J., in Appendix to opinion of the Court):

MNA participates directly in the bargaining process. It furnishes the local chapters * * * advice and guidance on collective bargaining; it holds seminars and gives lectures on bargaining goals and strategies; it supplies economic data * * * for use in bargaining negotiations. The associate executive director of MNA admitted that his primary function was to participate in every bargaining session between an employer and * * * employees * * *. He also advised and formulated bargaining goals and objectives for collective bargaining negotiations for chapters, as well as participated in the bargaining sessions to achieve them.

Accord, *Welfare and Pension Funds*, 178 N.L.R.B. No. 3, at —, 14 (1969) (local entity "may obtain a professional negotiator without cost from the parent [entity] upon request").

⁵⁷ *United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29, 34-35 (D. Utah 1962).

⁵⁸ *E.g.*, *Local 249, Teamsters*, 139 N.L.R.B. No. 39, at 605, 607 (1969).

The entities may participate in [A-16] other kinds of joint financing, too, as where one entity directly supports the other;⁶⁰ pays the other's expenses, such as salaries or costs;⁶¹ or makes payments or contributions to the same third-party recipients.⁶² Similarly, transfers of funds among entities evidence integration where the amounts "represent a substantial portion of the funds of either the transferor or transferee",⁶³ or where one entity "makes payments of substantially all of its income to or for the use of" another, and "the amount of support received by

⁶⁰ *NLRB v. Annapolis Emergency Hospital Assn.*, 561 F.2d 524, 538 (4th Cir. 1977) (opinion of Winter, J., in Appendix to opinion of the Court):

[E]vidence shows that MNA has means to control AAC and, in fact, exercises substantial control over bargaining activities. MNA's principal instrument of control is the power of the purse. AAC collects no dues and has no authority to assess its members. All dues are paid to ANA which remits a portion to MNA and the districts. AAC must make budget requests to the Council and if it approves, AAC's budget is subject to further approval by MNA's board of directors. If AAC incurs unforeseen expenses, it may obtain reimbursement only if the Council requests and the board of directors approves additional funds. Certainly MNA dominates AAC's bargaining and grievance procedures through fiscal control.

⁶⁰ *Taylor v. Standard Gas & Elec. Co.*, 96 F.2d 693, 704-05 (10th Cir. 1938).

⁶¹ *Id.* ("salaries and other expenses or losses"); *Miami Paper Board Mills*, 109 N.L.R.B. 167, 168-69 (1954) (salary); *Local 249, Teamsters*, 139 N.L.R.B. No. 39, at 605, 606-07 (1969) (expenses of organizing local branch); *United States v. General Motors Corp.*, 384 U.S. 127, 137 (1966) (expenses of policing mutual agreement).

⁶² *FEC Reg. § 100.14(e)(2)(ii)* (1977) ("similar pattern of contributions" an indicium that one political-action committee integrated with another).

[the other entity] is sufficient to insure [its] attentiveness to the operations of the [transferring entity]".⁶⁴ On the issue of "attentiveness", "[a]ll pertinent factors" should be considered, including "the length and nature of the relationship between [the entities] and the purpose to which the funds are put"; the amounts transferred and received; and other "evidence of actual attentiveness", such as the requirement that one entity make reports to the other.⁶⁵ Indeed, even where the amount of monies transferred is relatively small, integration can be inferred if, "in order to avoid the interruption of the [A-17] carrying on of a particular function or activity, the beneficiary [entity]" is "sufficiently attentive to the operations of the [transferor]"—as where either the transferor or transferee "earmarks the support received * * * for a particular program or activity".⁶⁶

Also characteristic of integration are common physical facilities or services, such as common offices,⁶⁷ shared cleri-

⁶³ FEC Reg. § 110.3(a)(1)(iii)(E) (1977).

⁶⁴ Treas. Reg. § 1.509(a)-4(i)(3)(iii)(a) (1978)

⁶⁵ Treas. Reg. § 1.509(a)-4(i)(3)(iii)(d) (1978)

⁶⁶ Treas. Reg. § 1.509(a)-4(i)(3)(iii)(b) (1978)

⁶⁷ NLRB v. Local 810, Teamsters, 460 F.2d 1, 3 (2d Cir. 1972) ("marketing activities conducted in the [same] building", even though areas "are separated by partitions and lockable doors * * *, and the employees of each [entity] have separate entrances and separate restrooms"); NLRB v. Jones Sausage Co., 257 F.2d 878, 879-80 (4th Cir. 1958) (entities "occupy the same building * * *. The quarters of the two are connected by an open door."); Insulated Bldg. Materials Co., 167 N.L.R.B. 1105, 1109 (1967) ("common buildings"); Springfield Electrotpe Serv., Inc., 166 N.L.R.B. 639, 640 (1967) (entities "housed in a single building owned by [one of them] with convenient inside access between the two"); Local 10, Seafarers, 138 N.L.R.B. No. 30, at 1142, 1148, (1962) ("offices in the same building"); Chemical Express, 117

cal staffs,⁶⁸ common telephone-numbers or -switchboards,⁶⁹ shared utilities,⁷⁰ and common post-office addresses.⁷¹

[A-18] Finally, various other contacts or relations among entities can establish integration: For example, that one entity has actively brought about substantial unanimity among others, and gained their adherence to its policies, by exchanges of information, meetings among officials, or specific invitations to engage in certain activities.⁷² Or that officials or staff-personnel of the entities regularly discuss common problems,⁷³ the practice of attending one another's

N.L.R.B. 29, 30 (1957) (entities "share a common office"); Crenshaw's Inc., 115 N.L.R.B. 1374, 1376 (1956) (entities "have their main offices at the same location"); Miami Paper Board Mills, 109 N.L.R.B. 167, 168-69 (1954) ("superintendents [of both entities] have their offices in the [same] plant building").

⁶⁸ Chemical Express, 117 N.L.R.B. 29, 30 (1957) (entities "share a * * * clerical force"); Local 10 Seafarers, 138 N.L.R.B. No. 30, at 1142, 1148-49 (1962) (shared staff of "clericals, stenographers, clerk-typists, telephone operators").

⁶⁹ Springfield Electrotape Serv., Inc., 166 N.L.R.B. 639, 640 (1967) ("cost of * * * telephone services * * * absorbed by [one entity] with an indefinite arrangement for reimbursement by [the other]"); Miami Paper Board Mills, 109 N.L.R.B. 167, 168-69 (1954) ("both [entities] have the same telephone listing").

⁷⁰ Springfield Electrotape Serv., Inc., 166 N.L.R.B. 639, 640 (1967).

⁷¹ Crenshaw's Inc., 115 N.L.R.B. 1374, 1376 (1956).

⁷² United States v. Parke, Davis & Co., 362 U.S. 29, 46-47 (1960); Overseas Motors, Inc. v. Import Motors Limited, Inc., 375 F. Supp. 499, 534 nn. 109-12 (E.D. Mich. 1974) (collecting cases).

⁷³ NLRB v. Local 810, Teamsters, 460 F.2d 1, 4 (2d Cir. 1972).

meetings or exchanging reports on each other's activities,⁷⁴ or simply having "extensive" or "constant" contacts among them.⁷⁵

V. Inadequate defenses to a finding of integration.

The absence of express agreements among sub-entities cannot, by itself, negate a finding of integration. Rather, "[i]t is enough that a concert of action is contemplated and that the [entities] conformed to the arrangement".⁷⁶ "[A]quiescence * * * coupled with assistance", and not agreement, suffices.⁷⁷ [A-19] "Acceptance of an invitation to participate in a plan, * * * [k]nowledge of a scheme * * * and participation in the plan with such knowledge" is enough; "prior agreements need not be shown to have been made between each and all of the [parties]".⁷⁸ The "rim-

⁷⁴ Local 421, Truck Drivers v. United States, 128 F.2d 227, 230-31 (8th Cir. 1942); American Column & Lumber Co. v. United States, 257 U.S. 377, 396-97 (1921); Overseas Motors, Inc. v. Import Motors Limited, Inc., 375 F. Supp. 499, 534 n.110 (E.D. Mich. 1974) (collecting cases).

⁷⁵ NLRB v. Local 810, Teamsters, 460 F.2d 1, 6 (2d Cir. 1972); Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945, 956-57 (S.D. Tex. 1972); Overseas Motors, Inc. v. Import Motors Limited, Inc., 375 F. Supp. 499, 534 (E.D. Mich. 1974).

⁷⁶ United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939).

⁷⁷ United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960), *citing* United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723 (1944).

⁷⁸ Hazeltine Research, Inc. v. Zenith Radio Corp., 239 F. Supp. 51, 77 (N.D. Ill. 1965).

Thus,

[i]f two persons pursue by their acts the same object often by the same means, one performing one part of the act and

less-wheel theory" requires only that, by the very nature of the business, everyone involved had to know that other persons or entities would be performing acts in furtherance of the common goal—but not that everyone knew each other's roles, the exact scope of the operation, or even the number of people or entities involved."

[A-20] On the other hand, formal contracts among sub-entities does not prove, by itself, that they are not integrated.⁸⁰ Neither is it dispositive that one entity "fathered the * * * practices [complained of] and forced them onto

the other part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient * * *. It is not essential that each * * * have knowledge of the details * * *, or of the exact part to be performed by the other[s] * * *; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan. *Picking v. Pennsylvania R.R.*, 5 F.R.D. 76, 77 (M.D. Pa. 1946).

⁷⁹ *Elder-Beerman Stores v. Federal Dep't Stores, Inc.*, 459 F.2d 138, 141, 146, 152-53 (6th Cir. 1972).

The "rimless-wheel theory" is particularly appropriate for application where the UTP is concerned. In each State, for example, the state-level UTP affiliate (e.g., the MEA in Minnesota) forms the hub of such a wheel, with each local-level affiliate (e.g., the MCCFA in the community colleges) as a separate spoke. Throughout the country, furthermore, the national-level UTP branch (i.e., the NEA) forms the hub of another wheel, with each state-level affiliate (e.g., the MEA) as a separate spoke. There are also wheels formed by the NEA-PAC as a hub, with the state-level UTP political-action committees (e.g., the IMPACE in Minnesota) as separate spokes, and by UniServ as a hub, with local-level UTP affiliates as spokes.

⁸⁰ *NLRB v. Gibraltar Industries, Inc.*, 307 F.2d 428, 431 (4th Cir. 1962).

the [other entities]’’,⁸¹ or that some of the entities “had not entered into voluntary combination but had in fact been bullied by economic duress into unwilling compliance with the [other entity’s] demands’’,⁸² or that “some * * * were more active and influential in the combination than were others, and that some * * * unwillingly * * * entered into the combination’’.⁸³

Finally, a finding of integration is not foreclosed simply because each sub-entity has its own employees, maintains its own books and records, occupies a separate office, or pays another sub-entity rent.⁸⁴

⁸¹ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948).

⁸² *McHugh v. United States*, 230 F.2d 252, 254 (1st Cir. 1956).

⁸³ *FTC v. Cement Institute*, 333 U.S. 683, 718-19 (1948).

⁸⁴ *NLRB v. Gibraltar Industries, Inc.*, 307 F.2d 428, 431 (4th Cir. 1962).

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of the attached **APPENDIX TO JURISDICTIONAL STATEMENT** on each of the following persons, by depositing said copies with the United States Postal Service, first-class postage prepaid, addressed as follows:

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Done this 1st day of December, 1982.

JAN 8 1983

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

No. 82-901

LEON W. KNIGHT, et al.,

Appellants,

v.

**MINNESOTA COMMUNITY COLLEGE FACULTY
ASSOCIATION, et al.,**

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA, FOURTH DIVISION**

MOTION TO AFFIRM

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IN THE
Supreme Court of the United States

No. 82-901

LEON W. KNIGHT, et al.,

Appellants,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY
ASSOCIATION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA, FOURTH DIVISION

MOTION TO AFFIRM

The Minnesota State Board for Community Colleges (MSBCC) moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States that as to the issues raised in Appellant's Jurisdictional Statement¹ the final judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Appellants seek by this appeal to persuade the Court to ignore or abandon its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) but present no reasons which would justify such a result.

¹ The MSBCC has also appealed to this Court from the district court's decision concerning the constitutionality of a section of the Minnesota Public Employment Labor Relations Act. The present motion to affirm is filed only as to the issues discussed herein which were raised by the appellants (plaintiffs below) in their Jurisdictional Statement.

STATEMENT OF THE CASE

This is a direct appeal from the findings and judgment by a district court of three judges constituted pursuant to 28 U.S.C. §§ 2281, 2284 sustaining the constitutionality of Minnesota's Public Employment Labor Relations Act (PELRA), Minn. Stat. § 179.61 *et seq.* (1980). Appendix to Jurisdictional Statement of Leon W. Knight, *et al.* (hereafter A.), p. 105.

The appellants are faculty members of various Minnesota community colleges all of which are under the jurisdiction of the MSBCC. PELRA establishes a system of collective bargaining in Minnesota between various public employers such as the MSBCC and their public employees. The employees are organized into bargaining units each of which is represented by an exclusive representative. The exclusive representative of the appellants' bargaining unit is the Minnesota Community College Faculty Association (MCCFA). The MCCFA is a private labor organization which is affiliated with the Minnesota Education Association (MEA) and the National Education Association (NEA) who were also defendants below. The appellants are members of the bargaining unit but are not members of the exclusive representative or any of its affiliated organizations.

Pursuant to PELRA, the MSBCC and the MCCFA have negotiated and have entered into a series of two-year contracts beginning in 1973 and continuing to the present. Such negotiated agreements under PELRA are subject to acceptance or rejection by the Minnesota Legislature. Minn. Stat. § 179.74, subd. 5 (1980). A. at 143.

For purposes of reaching an agreement as to the terms and conditions of employment, public employers under PELRA

are precluded from "meeting and negotiating" with anyone except the employees' exclusive representatives. Minn. Stat. § 179.66, subd. 2 and subd. 7 (1980). A. at 121-2.

Appellants brought this action in the United States District Court, District of Minnesota, Fourth Division, seeking damages and injunctive relief against enforcement of PELRA on the grounds that it violated appellants' First Amendment protections as well as the Fourteenth Amendment due process and equal protection clauses. Appellants contend that PELRA gives the MCCFA as exclusive representative legislative powers and deprives the appellants of similar power. They also argue that the MCCFA is, because of its affiliation with the MEA and NEA and due to its alleged activities, a political action organization indistinguishable from a political party and that appellants are unconstitutionally forced to accept the MCCFA as their representative.

The three judge district court unanimously rejected each of the appellants' contentions. After a trial lasting 41 days which produced 6000 pages of transcript and over 500 exhibits, the district court found that the exclusive representation and contract negotiation provisions of PELRA do not violate appellants' First and Fourteenth Amendment constitutional rights. The district court concluded that the MCCFA was not predominantly or significantly engaged in political activity and that its affiliations with the MEA and NEA did not constitute a single integrated organization. A. at 12-13. The district court also concluded that no constitutional violation arises as a result of the MCCFA's status as a private organization. A. at 9. Finally, the district court ruled that PELRA does not impermissibly delegate to the exclusive representative sovereign state power or power to make economic law. A. at 6.

ARGUMENT

I. THIS CASE IS CONTROLLED BY THE ABOOD DECISION.

The decision of the district court sustaining the constitutionality of PELRA is plainly correct. This Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), controls the issue of exclusive representation in public sector collective bargaining. The district court's decision is properly based on and controlled by the *Abood* decision. The appellants attempt to emasculate *Abood*. They have produced an extraordinarily voluminous record which they ask this Court to examine in hope that they can unearth some evidence that would present a different case than *Abood*. In this regard, the appellants' efforts are wasted.

The facts in this case are strikingly similar to the facts in *Abood*. In both cases there are statutorily imposed systems of public sector collective bargaining which establish exclusive representatives for employee bargaining units. In both *Abood* and in the present case, the exclusive representatives are private employee organizations selected by the members of the bargaining unit and not subject to the employer's control. In both cases the teachers' exclusive representatives are accused of being politically active. The appellants in each case are members of the bargaining unit but not members of the exclusive representative. The duties of the exclusive representatives are the same in both cases, i.e., negotiating and administering a collective bargaining agreement. In every critical matter, this case parallels *Abood*. The issues raised by appellants were decided by *Abood*. To note probable jurisdiction for this case would only serve to decide again those matters already decided in *Abood*.

A. The Constitutional Issues Involving Public Sector Collective Bargaining Were Reached In Abood.

The appellants have taken the position that *Abood* did not actually decide whether a collective bargaining system utilizing private exclusive representation for public employees was constitutional. The district court considered and properly rejected this argument. A. at 7.² *Abood* holds that public sector collective bargaining wherein public employees are exclusively represented by a private labor organization is not violative of the First and Fourteenth Amendments to the United States Constitution. In reaching this decision, this Court spent considerable time discussing the impact of the very factors which appellants claim remain undecided.

B. The Public Nature Of The Employees Was Considered In Abood.

The difference between public and private sector collective bargaining as it impacts the First and Fourteenth Amendments was central to this Court's decision. *Id.* at 225-233. It concluded that:

The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.

Id. at 232. There can be no doubt that the Court thoroughly considered and resolved the question of whether the *public*

² The concurring opinion of Justice Powell in *Abood* disputes the appellants' narrow view of that case and recognizes that "the Court's holding and judgment [remand for further proceedings] are but a small part of today's decision." *Id.* at 245-6.

nature of the employer and employee affected the constitutionality of collective bargaining:

The very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement on the First Amendment interests of public employees.

Id. at 231.

C. The Exclusivity Factor Was Considered In *Abood*.

Another objection to Minnesota's PELRA that appellants raise is the exclusivity factor insofar as it provides the employees' exclusive representative with greater influence in governmental decision-making than the appellants have. This objection was anticipated and resolved in *Abood*:

It is surely arguable, however, that permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decision-making process than is possessed by employees similarly organized in the private sector.

Id. at 229-30. Regardless of this possibility, the Court did not invalidate the principle of exclusivity in public sector labor relations presented in *Abood* which appellants so vigorously attack. Exclusive representation was an important part of the Michigan law considered in *Abood* and in the private sector labor cases,³ on which this Court relied. Its presence in Minnesota's PELRA underscores the applicability of *Abood* to the present case.

³ *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 76 S. Ct. 714 (1956) and *Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784 (1961).

D. The Lack Of Vitality Of The Schechter And Carter Coal Cases Was Determined In Abood.

Appellants allege that *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) preclude the alleged delegation by the State of Minnesota of its sovereign power. The district court rejected the appellants' allegations of a delegation of authority by the State on factual and legal grounds and further recognized that the continued viability of these two cases "was doubtful at best." A. at 6. It is readily apparent that the appellants seek probable jurisdiction in an attempt to persuade this Court to reverse its abandonment of the *Schechter* and *Carter Coal* non-delegation holdings. This Court could have accomplished this in *Abood* if it was so inclined. Instead, *Abood* decision confirmed the non-applicability of *Schechter* and *Carter Coal*. Contrary to the appellants' arguments, the issues they raise have been finally resolved and are not substantial federal questions.

II. THE RECORD DOES NOT CONTAIN ANY EVIDENCE THAT APPELLANTS' EXCLUSIVE REPRESENTATIVE IS SUBSTANTIALLY INVOLVED IN POLITICAL ACTIVITIES OTHER THAN THAT WHICH RELATES TO COLLECTIVE BARGAINING.

As a final argument, appellants contend that their exclusive representative, MCCFA, is so closely affiliated with the MEA, NEA, the Independent Minnesota Political Action Committee for Education (IMPACE) and the National Education Association Political Action Committee (NEA-PAC) so as to constitute a single integrated organization. They

further contend that this alleged integrated organization is by its nature a political action organization which as a result of the decision in *Branti v. Finkel*, 445 U.S. 507 (1980) should therefore be constitutionally disqualified from serving as the appellants' exclusive representative.

This Court has already addressed the question of political activities of the exclusive representative in *Abood* and has established that nonmembers cannot be forced to contribute to noncollective bargaining political activities. Nothing in the present case contradicts this determination.⁴

At the trial below, appellants presented hundreds of exhibits and numerous witnesses in an attempt to prove the integration and political action allegations against the exclusive representative and its affiliated organizations. The three-judge district court panel which exhaustively reviewed the lengthy record concluded that the appellants had totally failed to prove their allegations. A. at 11-13, 41-44. On the question of whether the MCCFA and its affiliated organizations constitute a single, indivisible entity, the district court concluded that no such integration in fact exists. A. at 12. On the question of whether the MCCFA and its affiliated labor organizations are so deeply involved in political activ-

⁴ The district court noted in its decision:

We emphasize that the plaintiffs [appellants] do not advance a narrow claim that some part of their fair share fees are misused for political activity unrelated to collective bargaining. Calculation of the fair share fee is not in dispute here and we note that there is a statutory procedure [Minn. Stat. § 179.65, subd. 2 (1980)] for resolving any such dispute.

A. at 10. This procedure was recently challenged and has been found not to be constitutionally infirm. *Threlkeld v. Robbinsdale Federation of Teachers, Local 872 AFL-CIO*, 316 N.W.2d 551 (Minn. 1982), *appeal dismissed*, — U.S. —, 103 S. Ct. 24 (1982).

ities as to constitute a political action organization, the district court concluded that that allegation "is flatly contradicted by the record." A. at 13. The labor organizations showed to the district court's satisfaction that their political activities relate almost exclusively to collective bargaining. A. at 11-12. No substantial question is presented by the appellants.

The district court of three judges has closely examined this record. If probable jurisdiction is granted, the three judge district court must be reversed not only on its legal decision but also on its findings of fact if the appellants are to prevail. The issues raised in this appeal are not substantial and certainly do not qualify for the extensive effort demanded by the appellants.

CONCLUSION

MSBBC respectfully submits that the appellants have failed to present a substantial question and that the judgment of the district court which is the subject of the appellants' Jurisdictional Statement should be affirmed as to the points raised there.

Dated: December 29, 1982.

Respectfully submitted,

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No. 82-901

Supreme Court, U.S.
FILED

JAN 4 1983

ALEXANDER L. STEVAS
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IN THE
Supreme Court of the United States

LEON W. KNIGHT, et al.,

Appellants,

v.

**MINNESOTA COMMUNITY COLLEGE
FACULTY ASSOCIATION, et al.**

Appellees.

**MOTION TO AFFIRM OF APPELLEE
LABOR ORGANIZATIONS**

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IN THE
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LEON W. KNIGHT, *et al.*,

Appellants,

v.

MINNESOTA COMMUNITY COLLEGE
FACULTY ASSOCIATION, *et al.*

Appellees.

**MOTION TO AFFIRM OF APPELLEE
LABOR ORGANIZATIONS**

Appellee Labor Organizations,¹ pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move to affirm those portions of the judgment of the United States District Court for the District of Minnesota appealed from by appellants. Said motion is based on the fact that the questions presented by appellants are so insubstantial as not to warrant further argument.

¹ The term "appellee labor organizations" shall be used to refer to the Minnesota Community College Faculty Association, the Minnesota Education Association, the National Education Association, the Independent Minnesota Political Action Committee for Education, and the past and present officials and staff identified in appellants' Jurisdictional Statement at i-ii, notes 2, 3 and 4.

STATEMENT

This is a direct appeal from the Memorandum Order and Opinion of a district court of three judges constituted pursuant to 28 U.S.C. § 2281 which was issued March 31, 1982, and reaffirmed by a denial of appellants' motion for rehearing on August 13, 1982. Appellants initiated this action to challenge the constitutionality of certain provisions of the Minnesota Public Employment Labor Relations Act (hereinafter "PELRA"), Minn. Stat. 179.61-179.76 (1980), and the constitutional ability of appellee Minnesota Community College Faculty Association (hereinafter "MCCFA") to act as the exclusive bargaining representative of community college instructors employed by co-appellee State Board for Community Colleges (hereinafter "State Board").

PELRA establishes a comprehensive framework for collective bargaining by public employees in the State of Minnesota. It provides for the democratic selection by public employees in an appropriate bargaining unit of an exclusive bargaining representative. Minn. Stat. 179.67, Appendix at A-122.² The exclusive bargaining representative has the exclusive right and duty to meet and negotiate concerning the terms and conditions of employment with the public employer of the employees it represents. Minn. Stat. 179.65, subds. 1, 2, 4; 179.66, subd. 2, Appendix at A-117-127. The duty to meet and negotiate under PELRA "means the performance of the mutual obligations of public employers and the exclusive representatives of public employees to meet at reasonable times, including where possible in advance of the budget making process, with the good faith intent of entering into

² All references to the Appendix herein are to the Appendix To Jurisdictional Statement submitted by the appellants.

an agreement with respect to terms and conditions of employment; *provided, that by such obligation neither party is compelled to agree to a proposal or required to make a concession.*" Minn. Stat. 179.63, subd. 16, Appendix at A-112 (emphasis supplied).

Appellants are instructors in certain Minnesota community colleges who are within a state-wide bargaining unit consisting of all instructors employed by the appellee State Board. Appellee State Board is an agency of the State of Minnesota responsible for the management and control of the state's community colleges. Appellee MCCFA is certified as the exclusive representative of the instructors' bargaining unit, and has met and negotiated several successive collective bargaining agreements with the State Board. The Minnesota State Legislature has reserved the right, in PELRA, to accept or reject such agreements. Minn. Stat. 179.74, subd. 5, Appendix at A-143. As noted by the lower court in its decision, the legislature has in the past exercised this prerogative by modifying contract terms. Memorandum Opinion and Order, Appendix at A-6.

The MCCFA is affiliated with appellees Minnesota Education Association ("MEA") and National Education Association ("NEA"). The latter two organizations are, respectively, state-wide and national voluntary associations of teachers. Under an affiliation agreement among the three organizations, MCCFA members pay "unified dues" to the MCCFA, MEA and NEA. The dedication of a portion of such dues to MEA and NEA is in exchange for staff, office and other assistance to MCCFA. Findings of Fact, Appendix at A-36.

Appellee Independent Minnesota Political Action Committee for Education ("IMPACE") is a voluntary, non-profit committee of individual educators. It is a political action

committee which receives contributions of money, and distributes that money to candidates for political office. While its Board of Directors is appointed by the MEA Board of Directors, it has sole authority over its funding decisions and other activity. Findings of Fact, Appendix at A-37.

The lower court found that all of the appellee labor organizations are independent and "are not and do not function or operate . . . as a single integrated unit." Findings of Fact, Appendix at A-40. In describing the activities of the MCCFA, the lower court stated that "nearly all activities relate directly to collective bargaining, formulation of a bargaining position, contract administration or closely related organizational and professional growth." Findings of Fact, Appendix at A-40. The court found a similarly substantial commitment to collective bargaining related activities on the part of the MEA and NEA. Findings of Fact, Appendix at A-41.

Appellants are not required and have decided not to join the MCCFA. All persons within a bargaining unit who elect not to join the exclusive representative, such as appellants, may be required to pay a "fair share"—*i.e.*, agency shop—fee to the exclusive representative. By statute the amount of the fee is "an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues." Minn. Stat. 170.65, subd. 2, Appendix at A-118.

Appellants initiated this suit alleging that their right of free association under the First and Fourteenth Amendments to the United States Constitution is abridged because of the MCCFA's role as their exclusive representative under PELRA. Recently, appellants have asserted in addition that

PELRA results in a constitutionally impermissible delegation of legislative power to the MCCFA. Appellants do not challenge the amount of the fair share fee assessed by the MCCFA.

ARGUMENT

A. Appellants' Argument That PELRA Unconstitutionally Delegates Legislative Power is Without Merit.

The appellants' argument of unconstitutional delegation is contradicted by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Appellants claim that the ability of an exclusive representative to meet and negotiate with a public employer delegates to the MCCFA a "legislative power to make public policies." Appellants' Jurisdictional Statement at i. There are numerous flaws and inconsistencies with appellants' argument, but the most obvious is that it ignores *Abood* and its affirmation of the principle of exclusive representation. In *Abood*, this Court ruled that an exclusive bargaining representative could constitutionally assess a fee against nonmembers whom it represented in collective bargaining, so long as that compulsory fee is not used for ideological purposes unrelated to collective bargaining. The Court discussed the principle of exclusive representation approvingly, stating that it

avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the pos-

sibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220-221 (citations omitted). The *Abood* decision rests squarely on previous decisions of this Court upholding the constitutionality of agency shop fees charged by private sector unions. *Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956).

Appellants forward numerous attempts to distinguish *Abood*, most of which amount to assertions that the Court did not mean what it said, or what it held. The assessment of an agency shop fee has as its fundamental underpinning the principle of exclusive representation. It is the activity of the representative on behalf of the bargaining unit employee who has not joined the representative which justifies the fee. In upholding the constitutionality of an agency shop fee in *Abood*, this Court necessarily approved the structure of exclusive representation underlying that fee. As the above quoted language from *Abood* demonstrates, the Court did so knowingly.

More fundamentally, and dispositive of this case, appellants have failed to establish that collective bargaining amounts to a delegation of legislative power. The MCCFA does not have the authority to establish "economic laws." It may only bargain with the public employer; *the public employer is not required to agree to any particular proposal, or to make a concession*. Minn. Stat. 179.63, subd. 16, Appendix at A-112. The only "economic laws" (if that label be applied to a collective bargaining agreement) which result from this process

are those negotiated terms to which the public employer agrees.

Appellants offer no persuasive precedent for the proposition that collective bargaining amounts to an improper delegation of legislative power. They rely primarily on the conclusory opinions of their so-called expert witnesses that collective bargaining results in the MCCFA having increased "influence" with respect to the terms and conditions of employment of community college instructors. These opinions have little factual basis. Beyond that, the appellants' equation of "influence" to "delegation" is a leap of logic which is unsupportable.

Appellants cite as authority for their position *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).³ *Schechter*, assuming arguendo its precedential importance, is easily disposed of. In that case, the Court struck down portions of the National Industrial Recovery Act on the basis that Congress had improperly delegated legislative power to the President of the United States in violation of Article I of the United States Constitution, which prescribes the authority and duties of the Congress. 295 U.S. at 529-30. *Schechter* may or may not have something to say about the requirement of separation of powers placed upon the federal government by the Constitution.⁴ It has nothing to say about how a

³ The district court noted that the continuing vitality of these decisions is "doubtful at best." Appendix at A-6.

⁴ Even appellants argue that cases involving delegation to public officers, as opposed to private persons, have no relevance to the facts at hand. Appellants' Jurisdictional Statement, 17 n. 55.

state may elect to structure its government.⁵

Carter addressed the question of delegation by Congress to private groups of certain authority to establish the hours of work and wages of coal miners. The statute in question established certain coal producing districts. If the producers of 2/3 of the coal in a district and over 1/2 of the miners employed in that district agreed through collective bargaining to a particular wage rate, then all coal producers and miners in the district were subject to that wage rate. *Carter* may be criticized and distinguished on a number of grounds. But the decision is easily disposed of in the present context by noting that in *Carter* there was a delegation to two private parties—the producers and the miners—who through agreement could enact wage rates binding on other private parties. In the present case, the public employer participates in the negotiations, and nothing becomes binding unless the public employer agrees. Such an arrangement is not a “delegation” of the kind condemned by *Carter*. Nor does *Carter* offer a scintilla of support for appellants’ assertion that increased

⁵ It is clear that the federal constitution does not require the states to observe in their internal organization the limitations imposed by the separation of powers doctrine, *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541, 552 (1908); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); 1 Cooper, *State Administrative Law* 45 (1965). It should be noted that the Minnesota Supreme Court has upheld those provisions of PELRA which require that a private arbitrator establish contractual terms and conditions in certain cases where the public employer and exclusive representative are unable to reach a negotiated agreement as against a claim that such compulsory arbitration is an unconstitutional delegation of authority. *City of Richfield v. Local No. 1215, I.A.F.F.*, 276 N.W. 2d 42 (Minn. 1979). If delegation of authority of this kind to a private arbitrator is permissible, it is clear that the Minnesota Supreme Court would find no constitutional impediment to the negotiation process, where the public employer retains the right not to agree to any proposal.

"influence" is the same as a delegation. In summary, appellants have totally failed to establish that participation in negotiations by a public employer with a properly certified exclusive representative constitutes a delegation of authority.

The lack of an unconstitutional delegation is further buttressed by the provisions of PELRA reserving to the legislature the right to accept or reject any negotiated agreement. Appellants assert that this retaining of authority is not relevant to the issue. Their argument lacks common sense insofar as the legislature's ability to review the negotiated agreement plainly gives *it*—not the MCCFA—the last word on employment terms and conditions in the community colleges. Appellants would also ignore the decisions of this Court which establish the importance of such retained authority. In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), for example, the Court upheld federal legislation setting up private industry boards in the coal industry each empowered to propose minimum prices which could be approved, modified or disapproved by a public commission. Because of the commission's final approval authority, the Court ruled: "Since law-making is not intrusted to the industry, this statutory scheme is unquestionably valid." 310 U.S. at 399. *See generally* Liebermann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L.J. 650, 667, 701-04, 718 (1975) (discussing constitutional significance of private delegates being subject to public review). Appellants have utterly failed to establish that any unconstitutional delegation exists as a result of the negotiations structure established by PELRA.

Appellants' arguments are also flatly inconsistent with positions which they have maintained throughout this litigation. Appellants have stated to the district court:

Plaintiffs do not challenge the abstract principles of exclusive representation or fair share fees as embodied in PELRA. If MCCFA were an independent organization akin to a traditional faculty-senate, and not substantially involved in political activism Plaintiffs would not complain.

Plaintiffs' Report to the Court on the Status of the Case as of Pre-Trial Hearing of 19 November 1979, p. 12. *See also* statements to the same effect in Plaintiffs' Brief in Opposition to Defendants' Motion to Discuss, submitted March 14, 1980, at pp. 12-13, 19, 46-47. If a "traditional faculty-senate" were certified as an exclusive representative, it would enjoy the same increased "influence" about which appellants complain. Such an obvious contradiction is indicative of the specious nature of the claim forwarded by appellants.

B. Appellants' Argument that the MCCFA is Constitutionally Disqualified From Acting as an Exclusive Representative Under PELRA is Without Merit.

Appellants argue that under this Court's decisions in *Elrod v. Burns*, 427 U.S. 346 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), it is a violation of their First Amendment freedom of association rights for the MCCFA to act as an exclusive representative. Their argument is based on the factual premises that the MCCFA together with the other appellee labor organizations constitute a single integrated organization, and that this organization is the constitutional equivalent of a political party. PELRA, according to this argument, compels appellants to associate with this "political party" in violation of First Amendment rights recognized in *Elrod* and *Branti*.

After an extensive trial, the lower court refused to accept the appellants' factual premises. First, the court rejected the appellants' claim that the appellee labor organizations are a single, integrated entity. Findings of Fact, Appendix at A-38. Thus, appellants' claim of coerced association may exist only with respect to the MCCFA, not the other appellee labor organizations. As noted above, "nearly all" MCCFA activities directly relate to collective bargaining. Second, the court rejected the appellants' claim that the appellee labor organizations are the constitutional equivalent of a "political party." Appellants' proof on this issue was fundamentally flawed by the failure to distinguish between political activity related to collective bargaining, and that which is not so related. Findings of Fact, Appendix at A-44; Memorandum Opinion and Order, Appendix at A-10. This distinction is at the heart of *Abood*, which recognizes and upholds the use of agency shop fees to support the necessarily political aspects of public sector collective bargaining. 431 U.S. at 231-32. While Appellants would have this Court overturn the factual findings of the lower court, they have presented nothing in their Jurisdictional Statement which justifies such an overturning, or which excuses their accusations of impropriety on the part of the lower court. See Appellants' Jurisdictional Statement at 28-29.

Moreover, appellants' case is insufficient legally even if the appellee labor organizations were found to be an integrated political action organization.⁶ Appellants do not allege that the appellee labor organizations have spent their compulsorily collected fair share fee on ideological activity unre-

⁶ Appellants' assertion that the lower court "apparently accepted Appellants' legal analysis" is not based on anything found in the lower court's findings or memoranda.

lated to collective bargaining. Rather they claim they are forced to associate with the labor organizations because they are represented by the MCCFA, and are forced to pay a fee to the MCCFA (irrespective of how the fee is spent). These links do not amount to an unconstitutional "association" for First Amendment purposes.

This Court's decisions in *Abood*, *Hanson* and *Street* stand for the proposition that a dissenting employee may constitutionally be required to pay a fee to a politically active union, so long as that fee is not used for ideological purposes unrelated to collective bargaining. Therefore, in order to allege a constitutionally cognizable claim of compelled "association" appellants must assert that part of their fees is being used by appellee labor organizations for proscribed purposes. Appellants make no such claim. Rather than challenging the size of the fair share fee, they object instead to being represented by or paying any fee to the MCCFA. This argument is foreclosed by *Abood*, *Hanson* and *Street*.

Appellants' argument is unsupported by *Elrod* or *Branti*. *Elrod* was decided prior to and was cited by the *Abood* court. In *Elrod*, several employees of the Cook County Sheriffs Department were fired because they failed to obtain support from or affiliate with the Cook County Democratic organization. The Court specifically described the affirmative conduct required of the employees:

In order to maintain their jobs, respondents were required to pledge their allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives.

427 U.S. at 335. Appellants are not required to pledge allegiance, work for, or obtain the sponsorship of the MCCFA. Findings of Fact, Appendix at A-49. While appellants are required to pay a fee to the MCCFA, that fee (unlike the coerced contribution in *Elrod*) is not used for ideological activity unrelated to collective bargaining. *Elrod* does nothing to assist the appellants in avoiding the clear holding of *Abood*, *Hanson* and *Street*: a politically active union may collect a fair share fee, so long as the dissenters' money is not used for proscribed purposes. Appellants' claim is legally insufficient.

CONCLUSION

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment of the lower court should be affirmed.

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No. 82-901

Supreme Court, U.S.

FILED

JAN 11 1987

ALEXANDER L. STEVENS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

LEON W. KNIGHT, *et al.*,
Appellants,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
et al.,
Appellees.

On Appeal from the United States District Court
for the District of Minnesota

**APPELLANTS' OPPOSITION TO APPELLEES'
MOTIONS TO AFFIRM**

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11 January 1983

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Pursuant to Rule 16.5 of the Rules of this Court, Appellants Leon W. Knight, *et alia*, hereby oppose Appellees' motions to affirm.

ARGUMENT

Appellees' silence concedes the substantiality of Appellants' contention that, by requiring the Board to negotiate exclusively with MCCFA over terms and conditions of employment in the community colleges, PELRA discriminatorily enhances MCCFA's influence over the course of public-policy decisionmaking, in violation of the principles of political equality this Court has consistently enforced through the Equal

Protection Clause of the Fourteenth Amendment.¹ For this reason alone, their motions should be denied. But even what Appellees say also compels denial of those motions.

First, Appellees claim that *Abood*² settled the issues in this appeal.³ Yet Appellees nowhere contradict a single point in Appellants' explanation of why *Abood* did not decide—and could not have decided—these questions.⁴ *Abood* upheld only the agency shop; *the constitutionality of exclusive representation the parties explicitly refrained from contesting, the lower courts assumed sub silentio, and this Court accepted as an unchallenged premiss*. Here, Appellants attack that very premiss. Rather than answering the questions they raise, citing *Abood* simply begs them.

Second, Appellees contend that PELRA delegates no governmental power to MCCFA because “the public employer is not required to agree to any particular proposal”.⁵ The delegation inheres, however, not in any requirement that the Board agree with “*particular proposal[s]*”, but in PELRA’s command that it *negotiate over all terms and conditions of college employment. PELRA makes fulfillment of the public interest in education contingent on the acquiescence of a specially privileged private group in the policies public officials desire to follow, or on the fortuitous ability of those officials to overcome whatever obstacles to the efficient functioning of public facilities that group may interpose through the direct action PELRA*

¹ See Jurisdictional Statement (J.) at 23-26.

² *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

³ Motion to Affirm [of Appellee State Officials] (S.) at 4-7; Motion to Affirm of Appellee Labor Organizations (U.) at 5-6.

⁴ J. at 19-23.

⁵ U. at 6 (emphasis deleted).

permits.⁶ Pretending that this situation involves no delegation of governmental power is self-evidently ludicrous.⁷

Appellees complain that Appellants' delegation-argument rests "primarily on the conclusory opinions of [Appellants'] so-called expert witnesses", and that "[t]hese opinions have little factual basis".⁸ Appellees forget that the testimony of Appellants' experts that public-sector collective bargaining delegates governmental power to private groups was *unimpeached and uncontradicted*—and that the only other relevant evidence in the record is the testimony of *Appellee State Officials' own* witness, the distinguished expert in industrial and labor relations from the University of Illinois, Professor Milton Derber, who defined PELRA's requirement that the Board negotiate with MCCFA as "a sharing of responsibility", and explained the statute as the result of "an increasing conviction that * * * State Legislator[s] do] have the right and the power to delegate various of these responsibilities or to share them * * * with private groups".⁹ The State Officials qualified Professor Derber as an expert-witness; and the UTP did not even bother to cross-examine him. Now is too late for Appellees to denigrate his testimony as "hav[ing] little factual basis".¹⁰

⁶ See J. at 14 & n.47.

⁷ See *id.* at 13 & nn.43-45.

⁸ U. at 7. The mischaracterization as "*so-called experts*" glosses over Appellees' failure to challenge the qualifications of any of these witnesses at trial.

⁹ J. at 4-5.

¹⁰ On appeal, Appellees cannot substitute their lawyers' arguments for the evidence they neglected to procure at trial. See, e.g., *In re Primus*, 436 U.S. 412, 434 n.27 (1978).

Third, Appellees question the materiality of *Schechter* and *Carter*.¹¹ *Schechter*, they say, involved “the requirement of separation of powers placed upon the federal government by the Constitution. It has nothing to say about how a state may elect to structure its government”.¹² Actually, *Schechter* reached the separation-of-powers issue only after first rejecting as “unknown to our law” and “utterly inconsistent” with the Constitution the argument “that Congress could delegate its legislative authority to [private] trade or industrial association or groups”.¹³ *Schechter* thus applied a *due-process* limitation equally binding on Congress and the state legislatures.¹⁴ The doctrine of separation of powers *eo nomine* may not limit the division of authority *within state government*. But *MCCFA* is a private organization, not an agency of the government of Minnesota, bringing it squarely within the first holding of *Schechter* and outside the separation-of-powers cases Appellees irrelevantly cite.¹⁵

Appellees claim *Carter* is inapposite because “in *Carter* there was a delegation to two private parties—the producers and the miners—who through agreement could enact wage rates binding on other private

¹¹ A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

¹² U. at 7-8 (footnotes omitted).

¹³ 295 U.S. at 537.

¹⁴ See the incisive analysis of Mr. Justice Brennan, dissenting, in *McGautha v. California*, 402 U.S. 183, 271-73 (1971), *especially* at nn.21-23.

¹⁵ Contrast the cases cited in U. at 7 n.5 with *Crowell v. Benson*, 285 U.S. 22, 57 (1932) (“[a] state may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process”).

parties", and because "[i]n the present case, the public employer participates in the negotiations".¹⁶ Yet, functionally, the *Carter* situation differed not at all from that under PELRA. Here, a private group organized on the exclusive-representation principle seeks agreement from a public agency to impose certain economic conditions on dissenting individuals within the group. In *Carter*, the same overall result obtained, even though the private group was itself subdivided into two units. Certainly *Carter* did not rest on the mere plurality of mutually cooperating exclusive representatives exercising delegated legislative power.¹⁷ Moreover, that here "the public employer participates in the negotiations" makes this *worse*, not better, than the *Carter* situation. Under the statute *sub judice* there, administrative officials of the national government could approve, disapprove, modify, or establish themselves the "codes" of economic law the private groups proposed—without any requirement that the officials *negotiate* "in good faith" with those groups. Nonetheless, *Carter* held this an unconstitutional delegation. Under PELRA, the Minnesota Legislature can approve or disapprove, *but not modify or establish itself*, the terms of collective-bargaining agreements with state employees¹⁸—subject always to the compulsion to *negotiate* with organizations such as MCCFA, or suffer the practical and political consequences of strikes.

¹⁶ U. at 8.

¹⁷ To the contrary, the Court explained that "[t]he effect [of the statute], in respect of wages and hours, is to subject the dissentient minority, *either of producers or miners or both*, to the will of the * * * majority". 298 U.S. at 311 (emphasis supplied). The bifurcation of the delegation to private parties had nothing whatsoever to do with the decision.

¹⁸ J. at 14-15 & n.48.

In short, if *Schechter* and *Carter* are not exactly on point here, it is only because PELRA delegates *more* governmental authority to private groups than did the statutes those decisions held unconstitutional. Appellees' reliance on *Sunshine*¹⁹ merely highlights their refusal to face this fact. *Sunshine* upheld the amended version of the statute *Carter* invalidated, because the amendments "eliminated [the unconstitutional] provisions of the earlier Act", and because the private producer-groups "function[ed] subordinately" to an administrative agency with "authority and surveillance over [their] activities".²⁰ The agency had no duty to negotiate with private parties, and exercised plenary power to fix economic standards in the industry "when in the public interest it deems it necessary".²¹ Here, conversely, PELRA compels the Board to negotiate with MCCFA, even while it imposes on MCCFA no duty to bargain only for those terms and conditions of employment that serve the interests of Minnesota's citizens.²²

Fourth, Appellees complain that "Appellants' arguments are * * * inconsistent with positions which they

¹⁹ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

²⁰ *Id.* at 387, 399.

²¹ *Id.* at 397.

²² *City of Richfield v. Local 1215, Fire Fighters*, 276 N.W.2d 42 (Minn. 1979), cited in U. at 8 n.5, emphasizes the latter point. *Richfield* upheld the compulsory-arbitration provisions of PELRA because the statute "ensure[s] the competence and accountability of the arbitrators", empowers a public agency to disqualify arbitrators who "mak[e] awards that are totally inappropriate", and requires the arbitrators to "make awards only after considering the potential financial impact on the community". 276 N.W.2d at 47. Obviously, nothing in PELRA ensures the "accountability" of MCCFA, subjects it to censure by a public agency if it attempts to negotiate "totally inappropriate" terms and conditions of employ-

have maintained throughout this litigation".²³ Even if true, this would be irrelevant: For the District Court explicitly decided the delegation-of-power question, squarely presenting that issue for review here.²⁴ Typically, however, Appellees misrepresent Appellants' statement, which related only to Appellants' argument on the application of *Branti*,²⁵ not *Schechter* or *Carter*. If MCCFA were independent of the UTP, and not itself substantially involved in political activism, *Branti* would not apply, because PELRA would not require Appellants to associate with a predominantly political organization as a condition of their employment. *Schechter* and *Carter* would be applicable, though, because MCCFA would remain a private, self-interested group. If, conversely, MCCFA were a traditional faculty senate *that functioned as an arm of the community college-administration*,²⁶ then neither *Branti* nor *Schechter* and *Carter* would apply. No one contends that MCCFA is part of the college administration, rather than a private organization. Therefore, *Schechter* and *Carter* apply directly. The record proves that MCCFA is integrated in the UTP, and that the UTP is a political-action organization. Therefore, *Branti* also applies.

Fifth and last, Appellees contend that both the facts and the law militate against Appellants' claim under *Branti*.²⁷ On the facts, the record speaks for itself:

ment, or precludes it from seeking its members' own political and economic self-interest heedless of "the potential financial impact on the community".

²³ U. at 9-10.

²⁴ See J. at 13-23.

²⁵ *Branti v. Finkel*, 445 U.S. 507 (1980). See J. at 27-28.

²⁶ Cf. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 681-90 (1980).

²⁷ S. at 7-9; U. at 10-13.

The parties' own stipulations, the UTP's massive admissions, and the uncontradicted testimony of Appellants' expert-witnesses established at least a *prima facie* case that the UTP is an integrated, political-action organization. Appellants' expert-witness and the UTP's lay-witnesses in accounting agreed that the evidence it introduced in defense did not and could not differentiate its extensive political activities into the categories "politics unrelated to collective bargaining" and "politics related to collective bargaining."²⁸ Thus, Appellants' case became conclusive. The District Court's purported "findings" to the contrary simply disregard or misrepresent the record, as any reasoning person can determine on inspection.²⁹

On the law, Appellees claim that exclusive representation does not forcibly associate Appellants with MCCFA.³⁰ This is nonsense. Where an individual has a right to speak or act, he has an associational right of constitutional dimension to speak or act through a representative.³¹ Logically, then, where PELRA compels Appellants to "meet and negotiate" with the Board through MCCFA as their exclusive representative, it imposes on them an associational relationship subject to constitutional scrutiny.³² Moreover, this

²⁸ J. at 8-12.

²⁹ See Appendix to Jurisdictional Statement at 151-437, especially at 335-93 (line-by-line comparison of District Court's "findings" to actual facts in the record).

³⁰ U. at 11-12.

³¹ *E.g.*, *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-7 (1964); *District 12, UMW v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-24 (1967).

³² See *Abood*, 431 U.S. at 232-35 (opinion of Stewart, J.). *Cf.* *Democratic Party v. LaFollette*, 450 U.S. 107, 122 & n.22.

Court has twice recognized that compulsory financial support of an exclusive representative "has an impact upon [employees'] First Amendment interests" and amounts to "forced association".³³ If mere financial support of the representative implicates First-Amendment interests, the statutory imposition of its representation on dissenting employees in the first instance must also raise constitutional issues. The *derivative* privilege to seize dissenting employees' monies to support the representative cannot logically constitute forced association if the *primary* privilege of being the representative does not.

Appellees then claim that *Branti* is inapplicable because exclusive representation does "not requir[e Appellants] to pledge allegiance [to] * * * or obtain the sponsorship of the MCCFA".³⁴ This is equally absurd. "Allegiance" is an "[o]bligation of fidelity and obedience to government in consideration for protection that government gives".³⁵ Both commentators and this Court have likened exclusive representatives to employees' "economic government".³⁶ And MCCFA's President testified that Appellants are obliged to accept the terms and conditions of employment MCCFA

³³ Abood, 431 U.S. at 222 (opinion of Stewart, J.); *IAM v. Street*, 367 U.S. 740, 749 (1961).

³⁴ U. at 13.

³⁵ *Black's Law Dictionary* (rev. 4th ed. 1968), at 99.

³⁶ *E.g.*, Summers, "Union Powers and Workers' Rights", 40 *Mich. L. Rev.* 805, 815-16 (1951) ("[t]he union is * * * the employee's economic government"); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198-203 (1944) ("bargaining representative [is clothed] with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents").

negotiates in consideration of its "fair representation" of them.³⁷ Similarly, a "sponsor" is "one who assumes responsibility for a person or a group".³⁸ This is precisely the function of any exclusive representative, and the very position MCCFA's President testified the organization occupies under PELRA.³⁹ Thus, this case exactly parallels *Branti*.

CONCLUSION

Appellees' motions to affirm being meritless, this Court should note probable jurisdiction and set this case down for full briefing and oral argument.

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³⁷ Transcript of Hearings Before Special Master Leonard K. Lindquist (T.) at 484-88. *See also* T. at 155-56, 208-09 (testimony of Appellants Knight and Kjer).

³⁸ *Webster's Seventh New Collegiate Dictionary* (1965), at 845.

³⁹ T. at 479-81.